

EXHIBIT 2

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

In re: PHARMACEUTICAL)
INDUSTRY AVERAGE WHOLESALE)
PRICE LITIGATION) MDL No. 1456
)
THIS DOCUMENT RELATES TO:) Civil Action No.
) 01-12257-PBS
US ex rel Ven-A-Care of)
the Florida Keys, Inc.)
v. Abbott Laboratories, Inc.)
No. 07-CV-11618-PBS)

VIDEOTAPED ORAL DEPOSITION OF JOSEPH E. FISKE

Volume 1

February 17, 2009

DEPOSITION upon videotaped oral
examination, of the witness, JOSEPH E. FISKE, taken
on behalf of Ven-A-Care of the Florida Keys, Inc. in
the above entitled cause pending in the United States
District Court, District of Massachusetts, before
TAMMY POZZI, Certified Shorthand Reporter in and for
the State of Texas, on February 17, 2009, in the law
offices of Jones Day, 77 West Wacker, 35th Floor,
Chicago, Illinois, between the hours of 9:05 a.m. and
4:49 p.m., pursuant to due notice and the Federal
Rules of Civil Procedure.

Page 2

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Page 3

1 INDEX
2 PAGE
3 Appearances. 2
4 JOSEPH E. FISKE
5 Examination by Mr. C. Jarrett Anderson. 5
6 Witness's Signature Page/Corrections 263
7 Reporter's Certificate 265
8 EXHIBITS
9 DESCRIPTION IDENTIFIED
10 1 Abbott Laboratories Inc.'s Responses to
11 Ven-A-Care's 30(B)(6) Notice of Deposition of
12 Abbott Laboratories Inc. 31
13 2 Ery Contract Pricing 2003-2005. 53
14 3 Abbott Laboratories Inc. Multi Source
15 Erythromycins Wholesaler Acquisition Cost
16 Effective July 1, 2003. 53
17 4 Abbott Laboratories Inc. Multi Source
18 Erythromycins Wholesaler Acquisition Cost
19 July 1, 2001 Thru June 30, 2003. 53
20 5 Ery Deal Issue in CPCC 11/13/02 69
21 6 Abbott Laboratories Inc. Multi Source
22 Erythromycins Wholesaler Acquisition Cost
23 July 1, 1995 Thru June 30, 1996. 77
24 7 PPD New Product Set-Up Process Map. 122
25 8 NAM Mission Statement for a New Product
Launch. 131
9 Fax to Medical Economics Company from
10 Pharmaceutical Products Division. 134
11 Micromedex Price List Verification 2004 145
12 Micromedex Price List Verification. 152

Page 4

1 EXHIBITS CONTINUED
2 DESCRIPTION IDENTIFIED
3 12 10/4/04 E-mail string, Subject: Synthroid
4 00048 NDCs. 161
5 13 Handwritten Notes 220
6 14 3/7/01 Interoffice Correspondence, Re: Rules
7 of The Road 221
8 15 Price Reduction Response Statement. 227
9 16 6/14/01 Chicago Tribune article 229

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Page 5

1 PROCEEDINGS
2 THE VIDEOGRAPHER: We are on the
3 record. It is Tuesday, February 17th, 2009. It is
4 9:05 a.m. This is the beginning of tape 1.
5 Will the court reporter please swear
6 in the witness?
7 JOSEPH E. FISKE,
8 having been first duly sworn, testified as follows:
9 EXAMINATION
10 BY MR. ANDERSON:
11 Q. Good morning, sir. How are you?
12 A. I'm fine, thanks.
13 Q. Can you state your name for the record,
14 please?
15 A. Joseph E. Fiske.
16 Q. Mr. Fiske, you and I have met once before,
17 and you've been deposed and -- and that deposition is
18 now part of this case. Do you understand that?
19 A. Yes, I do.
20 Q. Okay. Accordingly, I'm not going to
21 belabor too much of the background experiences and
22 what have -- have you that you've had, but I do have
23 some questions along those lines.
24 Have you been deposed in any cases
25 since roughly March of 2007 when you were previously

2 (Pages 2 to 5)

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<p style="text-align: right;">Page 6</p> <p>1 deposited in the deposition that's part of this case?</p> <p>2 A. Yes, I have.</p> <p>3 Q. How many times?</p> <p>4 A. I don't know exactly. At least two.</p> <p>5 Perhaps more.</p> <p>6 Q. Were those depositions part of a case</p> <p>7 involving price reporting such as AWP?</p> <p>8 A. No.</p> <p>9 Q. What were those cases about generally?</p> <p>10 A. One was regarding Tri-Cor litigation, and</p> <p>11 the other one was Norvir litigation -- the repricing</p> <p>12 of Norvir.</p> <p>13 Q. What do you mean by "repricing"?</p> <p>14 A. In 2003, Abbott repriced Norvir to reflect</p> <p>15 its value in the marketplace. It was basically a</p> <p>16 different product than when it was originally</p> <p>17 introduced.</p> <p>18 Q. And did the price go up or go down?</p> <p>19 A. The price went up.</p> <p>20 Q. What about Tri-Cor? What was the basic</p> <p>21 thrust of that case?</p> <p>22 A. I don't know all the details of the case.</p> <p>23 I -- I think there were allegations that Abbott was</p> <p>24 thwarting generic competition.</p> <p>25 Q. The pat- -- it's -- it -- it had to do with</p>	<p style="text-align: right;">Page 8</p> <p>1 Senior Director of Reimbursement at Corporate. I</p> <p>2 spoke with Tip Parker who is Director of Trade</p> <p>3 Relations. I spoke with Ruey Tu from our</p> <p>4 International Pricing Group. I spoke with John King</p> <p>5 who is a Regional Sales Manager for our Government</p> <p>6 Reimbursement Policy and Long-Term Care's group. I</p> <p>7 spoke with Martha Schrader who is our Divisional Vice</p> <p>8 President of Public Policy and Strategy. I spoke</p> <p>9 with Charlie Aubuchon who currently works in Creative</p> <p>10 Services within Abbott, but sometime ago, in the late</p> <p>11 '80s and early '90s, was a promotional manager for</p> <p>12 the Ery products among other products.</p> <p>13 Q. What's his -- I'm sorry to interrupt you,</p> <p>14 but what is his current position?</p> <p>15 A. We have an in-house Creative Services</p> <p>16 group, or in-house ad agency. He works in that</p> <p>17 group.</p> <p>18 I spoke with a number of people -- oh,</p> <p>19 I'm sorry. Excuse me. I spoke with Mark Turon who</p> <p>20 worked in Pricing and Planning for approximately</p> <p>21 eleven years. Nine of those years, he was Manager of</p> <p>22 Pricing Operations, responsible for the chargeback</p> <p>23 group; the people that reported price to the various</p> <p>24 entities when we took price changes, etcetera.</p> <p>25 I spoke with a number of current and</p>
<p style="text-align: right;">Page 7</p> <p>1 the expiration of a patent?</p> <p>2 A. It had to do with the introduction of new</p> <p>3 formulations of Tri-Cor.</p> <p>4 Q. Near the expiration of an existing patent</p> <p>5 on a Tri-Cor formulation?</p> <p>6 A. That's correct.</p> <p>7 Q. Okay. All right. Do you understand that</p> <p>8 you're here today to testify on behalf of Abbott as a</p> <p>9 corporation?</p> <p>10 A. Yes, I do.</p> <p>11 Q. And when did you gain an understanding that</p> <p>12 you would be testifying as the corporate</p> <p>13 representative?</p> <p>14 A. Many months ago. I -- I couldn't tell you</p> <p>15 precisely when.</p> <p>16 Q. Have you taken steps to gather information</p> <p>17 in order to testify as the corporate representative?</p> <p>18 A. Yes, I have.</p> <p>19 Q. Did you speak to individuals at Abbott in</p> <p>20 preparing to testify?</p> <p>21 A. Yes, I did.</p> <p>22 Q. Who?</p> <p>23 A. I spoke with Dale Johnson who is the</p> <p>24 Divisional Vice President of State Government</p> <p>25 Affairs. I spoke with Virginia Tobiason who is</p>	<p style="text-align: right;">Page 9</p> <p>1 previous employees who had responsibility for price</p> <p>2 reporting, including Krista Kleidon, Tina Calvert,</p> <p>3 April Gerzel, Dana Chavira.</p> <p>4 I spoke with a number of people who</p> <p>5 worked in our chargeback area, as well as people who</p> <p>6 had responsibility for responding to various bid</p> <p>7 requests, including Donna Arnold, Donna Dunski, Lori</p> <p>8 Eidson, spelled E-i-d-s-o-n.</p> <p>9 I spoke with Ronny Lancaster who is</p> <p>10 our Senior Manager of Strategic Pricing for Public</p> <p>11 Payor Markets.</p> <p>12 I may have spoken with others that</p> <p>13 I've forgotten. If I think of them, I'll try and</p> <p>14 remember to tell you.</p> <p>15 Q. Thanks. That was quite a list. I tried</p> <p>16 desperately to keep up. As we go through the topics</p> <p>17 for which you've been designated, I may have some</p> <p>18 specific questions about what you've learned from</p> <p>19 different individuals that you've talked with.</p> <p>20 A. Sure.</p> <p>21 MR. BERLIN: That- -- that's fine.</p> <p>22 And we -- and, you know, we -- I had written to you</p> <p>23 on, I guess, the 6th, and we talked after Tara had</p> <p>24 written to you on the 6th --</p> <p>25 MR. ANDERSON: Uh-huh.</p>

3 (Pages 6 to 9)

<p style="text-align: right;">Page 10</p> <p>1 MR. BERLIN: -- and his investigation, 2 in fact, went beyond what I told you we were going to 3 do but I didn't feel -- I -- I -- I mean, I hope 4 that's okay. I figured you -- "beyond" was -- I 5 didn't give no- -- give you notice that we were going 6 beyond. 7 MR. ANDERSON: No, that's not -- 8 MR. BERLIN: But I mean -- 9 MR. ANDERSON: -- a problem. 10 MR. BERLIN: -- that's -- that's -- we 11 that -- wanted to make sure it was thorough. 12 MR. ANDERSON: Thanks. 13 A. I also did speak with both internal counsel 14 as well as external counsel preparing for the case. 15 MR. BERLIN: And you don't have a 16 question pending obviously, but -- I mean, I do -- 17 it's worth noting that we'll be claiming privileges 18 as to those conversations but -- we're going to 19 in- -- to -- we're going to interpret your questions 20 as not asking for attorney-client privilege 21 information unless you are explicitly asking for 22 that. 23 MR. ANDERSON: Well, I'll tell you, 24 I -- I think the better course would be, Eric, if you 25 feel like one of my questions is calling for</p>	<p style="text-align: right;">Page 12</p> <p>1 or is that a -- 2 A. I don't -- 3 Q. -- different Sara? 4 A. -- believe so. 5 Q. Okay. And then as far as external legal 6 counsel, Mr. Berlin was someone you talked with? 7 A. Eric Berlin. 8 Q. Yes. 9 A. There may have been other people on some of 10 the phone conversations. I apologize, I don't recall 11 every single person that may have been a part of the 12 phone conversations that I also had. 13 Q. Okay. How -- how many hours would you say 14 you spent talking with these individuals? 15 A. I spent a total of probably 40 to 50 hours 16 preparing for the case. I spoke with most of those 17 individuals for about an hour apiece, some of them as 18 short as 15 minutes. 19 I spent a couple of phone 20 conversations with Mr. Berlin as well as some other 21 people from legal counsel. I also met with him 22 briefly about two weeks ago for a couple of hours and 23 probably nine hours yesterday. 24 Q. Did you review any documents in preparing 25 to testify?</p>
<p style="text-align: right;">Page 11</p> <p>1 Mr. Fiske to disclose privileged information, then 2 assert the objection, and then I can -- I can frame 3 my questions so that we avoid that. 4 MR. BERLIN: Okay. 5 MR. ANDERSON: I'm not -- my goal is 6 not to obtain attorney-client privileged -- 7 MR. BERLIN: I -- 8 MR. ANDERSON: -- information. 9 MR. BERLIN: I understand. I 10 assumed -- 11 MR. ANDERSON: But I -- 12 MR. BERLIN: -- you wouldn't. 13 MR. ANDERSON: -- I -- I -- it would 14 be -- it's going to -- it's not going to work unless 15 you assert the privileges when you feel like you need 16 to, so that I can then work around it. 17 MR. BERLIN: Okay. Well, let's see 18 how it goes. 19 MR. ANDERSON: Okay. 20 Q. (BY MR. ANDERSON): Who in the Abbott 21 in-house counsel did you talk with? 22 A. Sara Weil. 23 Q. What's the last name? 24 A. Weil, W-e-i-l, I believe. 25 Q. Is -- is that -- was her maiden name Like,</p>	<p style="text-align: right;">Page 13</p> <p>1 A. I was shown a number of documents. I also 2 saw documents in some depositions that I read in 3 preparation for this. 4 Q. Which depositions did you read? 5 A. I read my previous deposition for the Texas 6 case. I read Debbie DeYoung's deposition for that 7 same case. Both of those were from March of 2007. 8 Q. Uh-huh. 9 A. I read a more recent deposition by Beth 10 Garvin that was taken in December of '08 related to 11 this particular case. 12 Q. And you reviewed some of the exhibits to 13 those depositions; is that correct? 14 A. Not all of the exhibits were attached. I 15 re- -- I looked at the ones that were. 16 Q. What other documents did you review? 17 A. There were numerous documents that I was 18 shown yesterday that apparently have been presented 19 in other depositions and -- and others that were 20 not. I couldn't tell you exactly which documents 21 I've seen. I've seen so many. 22 I can certainly -- if -- if I see 23 them, I can make note of it if I remember that it's 24 one that I've seen before. 25 Q. Okay. Thank you.</p>

4 (Pages 10 to 13)

<p style="text-align: right;">Page 14</p> <p>1 A. Quite honestly, I'm not sure I'll recall if 2 I saw them recently or from a former time that I may 3 have seen them. 4 Q. Right. Other than reviewing documents 5 yesterday -- I take it you reviewed those -- reviewed 6 those documents yesterday with Mr. Berlin, correct? 7 A. There were documents that we reviewed 8 yesterday, as well as documents that I had reviewed 9 at other times, like I said, when I was reading the 10 depusi- -- depositions -- 11 Q. Uh-huh. 12 A. -- and I don't recall whether we reviewed 13 any documents when we met a few weeks ago. 14 Q. Other -- other than reviewing documents 15 with Mr. Berlin and reviewing deposition exhibits 16 that were a part of the DeYoung, Joe Fiske, and Beth 17 Garvin depositions, did you review any other 18 documents? 19 A. I looked at some bid schedules. I looked 20 at some contract documents. I looked at some price 21 increase notifications. I believe that's the extent 22 of what I looked at. 23 Q. Did you review any documentation from the 24 Managed Care division or department? 25 A. No, I didn't.</p>	<p style="text-align: right;">Page 16</p> <p>1 indicating that -- I believe that a number of GPOs 2 were passing those admin fees along to their 3 customers, which would imply that they were a 4 discount rather than just an admin fee. 5 Q. Can you remember the subject matter of any 6 other OIG reports that you reviewed? 7 A. Not that I reviewed. There -- there -- I'm 8 sure there are others that I have seen. I just -- 9 Q. Uh-huh. 10 A. -- don't recall right off the top of my 11 head. 12 Q. Other than the -- the OIG reports 13 pertaining to administrative fees of GPOs, are you 14 aware of any other OIG reports reviewed by Abbott 15 personnel -- 16 A. Yes. 17 Q. -- specifically? Which ones? 18 A. Martha Schrader was familiar with OIG 19 reports that were issued regarding the fact that AWP 20 pricing reported by the data agencies did not reflect 21 actual acquisition costs by retail pharmacies. 22 Q. That -- you gained that information in your 23 discussion with Ms. Schrader recently? 24 A. Yes. 25 Q. When did Ms. Schrader review those reports?</p>
<p style="text-align: right;">Page 15</p> <p>1 Q. Did you review any bid materials exchanged 2 between Abbott and customers, such as GPOs or chain 3 pharmacies or wholesalers who would request that 4 Abbott bid for placement of its drugs on those 5 customers' formularies? 6 A. Only to the extent that they may have been 7 part of the documents that I reviewed that were part 8 of previous depositions. 9 Q. Did you review any government documentation 10 such as OIG reports? 11 A. Not at this point in time. I've seen such 12 documents over the -- over the course of my career in 13 Pricing. 14 Q. When -- let me back up a step. When I 15 refer to the "OIG," do you understand I'm referring 16 to the Office of Inspector General for Health and 17 Human Services? 18 A. Yes. 19 Q. Okay. When -- strike that. 20 In what context in the past have you 21 reviewed OIG reports? 22 A. Periodically people would send me reports, 23 and I can't tell you exactly in what context. One I 24 remember is a report regarding GPO admin fees that 25 was issued -- I believe it was OIG that issued it --</p>	<p style="text-align: right;">Page 17</p> <p>1 A. She didn't give me a specific time frame. 2 I didn't ask her for a specific time frame. 3 Q. Did Ms. Schrader provide you with those -- 4 any copies of those reports? 5 A. No, she didn't. 6 Q. What was your understanding of the findings 7 of these reports? 8 A. They were reports that were issued, I 9 believe, to Health and Human Services -- and 10 obviously available, actually, for the public, which 11 means states and others would have access to them -- 12 that, as I described previously, indicated that AWP 13 as reported by the -- by the data agencies overstated 14 acqu- -- actual acquisition costs versus what 15 pharmacies were actually paying for product. 16 Q. Do you have any understanding of the 17 specific findings with respect to how much AWP 18 overstated actual acquisition cost? 19 A. No, I don't. 20 Q. Do you have any information about the 21 findings of these reports with respect to generic 22 drugs versus brand drugs? 23 A. No, I don't. 24 Q. Do you have any information about the 25 findings of these reports with respect to any given</p>

5 (Pages 14 to 17)

Page 18

1 manufacturer's drugs?
 2 A. No, I don't.
 3 Q. Do you know whether it was one single
 4 report or multiple reports that Ms. Schrader had
 5 reviewed?
 6 A. From my discussion, I believe it was
 7 multiple reports, but I can't state that with
 8 certainty.
 9 Q. Did you gain any understanding about the
 10 context in which Ms. Schrader reviewed these reports?
 11 A. Martha Schrader is, as I described
 12 previously, our Divisional Vice President for Public
 13 Policy and Strategy.
 14 Q. Uh-huh.
 15 A. She had previously worked for another
 16 manufacturer. I don't know exactly what her
 17 responsibilities were there. But in the course of
 18 her job responsibilities, she keeps abreast of
 19 legislation, reports that are coming out from the
 20 government, etcetera, as it might affect the industry
 21 in general.
 22 Q. Has Ms. Schrader or anyone working for
 23 Ms. Schrader ever had any responsibility for setting
 24 of prices on Abbott drugs?
 25 A. No.

Page 19

1 Q. To your knowledge, has anyone at Abbott
 2 who's ever had any responsibility for setting prices
 3 on Abbott drugs reviewed any OIG reports concerning
 4 AWP?
 5 MR. BERLIN: Objection, form and
 6 scope.
 7 A. I don't know because I don't know whether I
 8 have actually specifically seen such a report
 9 myself. I -- as I indicated, I believe I've seen and
 10 read a -- a number of OIG reports, but I do an awful
 11 lot of reading in my job, and I can't remember
 12 specifically everything I've read.
 13 Q. (BY MR. ANDERSON): Do you have any copies
 14 of any OIG reports in your files concerning published
 15 pricing such as AWP pricing?
 16 A. I don't believe so, but I may have. I
 17 don't know.
 18 Q. Have you searched for those?
 19 A. When we searched for files for production
 20 for this case, we looked through any files that may
 21 have been labeled "AWP" or -- and I don't have a file
 22 that's called "OIG," so... We produced everything
 23 that we had.
 24 Q. So if you had any --
 25 A. I couldn't have looked through every file

Page 20

1 that I have, quite honestly.
 2 Q. Well, I understand, but I'm saying, to your
 3 knowledge, as the Abbott corporate representative,
 4 any OIG reports that would have been maintained in
 5 the files of Abbott personnel responsible for price
 6 setting would have been located in your prior
 7 searches; is that correct?
 8 MR. BERLIN: Objection, form, scope.
 9 A. I -- I can't state for certainty. My
 10 personal experience is that we have very man- -- you
 11 know, many, many files. We try and produce
 12 everything that's related to a case when it's -- when
 13 the information is listed out for us in terms of what
 14 we need to provide.
 15 It's possible that things may have
 16 been overlooked by somebody, but to the best of my
 17 knowledge, everything was produced that was
 18 available.
 19 Q. (BY MR. ANDERSON): Is your awareness of
 20 any Abbott personnel's review of OIG reports limited
 21 to what you learned from Ms. Schrader?
 22 A. Yes, I believe so.
 23 Q. And Ms. Schrader didn't share with you any
 24 documentation regarding any OIG reports that she had
 25 reviewed, did she?

Page 21

1 A. No, she did not.
 2 Q. And you're not able to recall any of the
 3 specifics about the time frame for which the report
 4 was published, etcetera?
 5 MR. BERLIN: Objection, form.
 6 A. I didn't specifically ask that question.
 7 Q. (BY MR. ANDERSON): Okay. Do you have any
 8 information whatsoever that Ms. Schrader shared her
 9 awareness of the OIG reports concerning AWP pricing
 10 with any other Abbott personnel, other than you,
 11 obviously, in preparing to testify?
 12 A. I'm going to answer the question this way,
 13 but I -- it is somewhat speculative. She manages a
 14 group of people. And, in fact, one of the people who
 15 worked for her at one point in time used to do web
 16 searches for different kinds of information affecting
 17 the industry, and she -- she may have shared such
 18 information with one of her employees or he may have
 19 been the source for the -- for the report but I don't
 20 know.
 21 To my knowledge, she did not share
 22 that information with Pricing and Planning, but I
 23 wa- -- I want to be careful because the employee,
 24 Tom -- I can't recall his last name right now -- used
 25 to actually copy us periodically on, like, a -- a --

6 (Pages 18 to 21)

<p style="text-align: right;">Page 22</p> <p>1 a daily newsletter of key happenings, just excerpts 2 of things. 3 But I don't recall specifically an OIG 4 report coming from Martha's group to us. 5 Q. How long has Martha been in her -- well, 6 strike that. 7 How long has Ms. Schrader been with 8 Abbott? 9 A. Six years. 10 Q. So the earliest time frame that she could 11 have been reviewing OIG reports while at Abbott would 12 have been 2003 -- 2002 at the earliest? 13 A. Correct. But she -- as I indicated, she 14 had similar responsibilities, I believe, at another 15 company. But at Abbott, that's a correct statement. 16 Q. Right. What was that other company? 17 A. I think it was Amgen, but I -- 18 Q. Okay. 19 A. -- I don't want to be -- I may be mistaken. 20 Q. But not a company that was affiliated in 21 any way with Abbott? 22 A. Not to my knowledge. 23 Q. Okay. All right. We'll come back to that 24 potentially. 25 What did you discuss with Ms. Tobiason</p>	<p style="text-align: right;">Page 24</p> <p>1 Ms. Tobiason started with Abbott back in 1974? 2 A. I said '94. 3 Q. Yes, sir. 4 A. I think. I -- I could have a mis- -- 5 mi- -- mistaken memory. Maybe she said that she 6 worked in HPD Home Infusion from '94, but I think she 7 told me she started in '94. I could be mistaken. 8 MR. BERLIN: Do you know? 9 Q. (BY MR. ANDERSON): I believe she's been 10 with the company for years and years and -- 11 A. That's possible. 12 Q. (BY MR. ANDERSON): -- years. I thought 13 maybe you misspoke. I don't know. 14 A. Well, you know what? I have the '94 date 15 in my mind, and maybe that's when she was in Home 16 Infusion. Or maybe I'm just having poor memory. 17 Q. Well, you -- you spoke to a lot of people. 18 I'm -- you know, I'm not trying to -- 19 A. I'm certainly not trying to misrepresent 20 facts at all. 21 Q. Yeah. Well, I -- I just want to -- 22 MR. BERLIN: I -- 23 Q. -- double-check it. 24 MR. BERLIN: I don't remember. I 25 mean, if I -- if I knew for a fact, I would --</p>
<p style="text-align: right;">Page 23</p> <p>1 in prep- -- preparation to testify as the corporate 2 representative? 3 A. I actually just reviewed the various topics 4 that I was supposed to be prepared to testify on and 5 actually went through them one by one with her. She 6 had very little knowledge about most of those 7 issues. 8 Her title is Senior Director of 9 Reimbursement for Corporate. She's held -- I think 10 she's been with Abbott since 1994. She started off 11 in the Hospital Products Division where she was 12 Director of Reimbursement for the Home Infusion 13 group -- 14 Q. Uh-huh. 15 A. -- subsequently worked in ADD as Director 16 of Reimbursement. Her focus was not on oral 17 pharmaceuticals. Her focus has always been on -- on 18 "Part B drugs," I'll refer to them as -- I'm sure 19 you know what I mean -- 20 Q. Uh-huh. 21 A. -- Medicare Part B, or devices. 22 And so when I talked with her, she -- 23 she really did not know a lot about the 24 pharmaceutical business that I work in. 25 Q. It was -- it was your understanding that</p>	<p style="text-align: right;">Page 25</p> <p>1 MR. ANDERSON: Yeah. 2 MR. BERLIN: -- alleviate our -- 3 MR. ANDERSON: Yeah. 4 MR. BERLIN: -- curiosity, but -- 5 MR. ANDERSON: Well, I -- 6 MR. BERLIN: -- just don't recall. 7 Q. (BY MR. ANDERSON): I mean, for what's it 8 worth, I'm fairly certain she was with Abbott 9 Hospital for many, many years, maybe dating back into 10 the '80s and I think even potentially back into the 11 70s, but I'm fairly confident she was with Abbott HPD 12 in the -- in the '80s for sure. But anyway -- 13 MR. BERLIN: In the 1980s? We're not 14 talking, like, Civil War here, right? 15 MR. ANDERSON: No, she's not -- 16 MR. BERLIN: Not that many years? 17 MR. ANDERSON: No, and I won't tell 18 her you said that either. 19 MR. BERLIN: Thank you. 20 Q. (BY MR. ANDERSON): So -- anyway, so you 21 walked through the different topics for which you've 22 been designated to testify on behalf of Abbott today 23 with Ms. Tobiason, and she conveyed to you that she 24 didn't have any information on those topics; is that 25 correct?</p>

7 (Pages 22 to 25)

Page 26

1 A. I -- I don't want to say that she had no
2 information. She had very little that's relevant.
3 She knew, for example, that some Medicaid
4 reimbursement was based on AWP's.

5 Q. Uh-huh.

6 A. She didn't know where the Medicaid agencies
7 obtained those AWP's from, how those AWP's were
8 determined. She -- she had no knowledge regarding
9 industry setting of prices, no knowledge regarding
10 PPD's reporting of prices. She did know that HPD had
11 reported prices to the pricing compendia.

12 That's why I said she had very little
13 knowledge that's relevant, I think, to -- to this
14 discussion.

15 Q. Okay. So she -- other than generally
16 knowing that Medicaid agencies used AWP's to set
17 reimbursement, she didn't really have any other
18 information that was pertinent to your testimony on
19 behalf of Abbott in this case; is that correct?

20 A. That's correct.

21 Q. Were there other individuals who you spoke
22 to where you went through the topics that you've been
23 designated to testify?

24 A. A number of them.

25 Q. A num- -- okay. So that was a standard

Page 27

1 line of communication you had with these people in
2 preparing to testify?

3 A. Not every individual, but a number of them.

4 Q. I see. Okay. Well, let's -- let's dive
5 into the topics themselves, then, and -- oh. One
6 clerical thing.

7 Charlie -- I missed his last name --
8 the -- the gentleman who's now in Creative Services
9 and was previous a promotional manager for the Erys?

10 A. Aubuchon. And I probably am not going to
11 spell it correctly myself.

12 Q. All right.

13 A. I believe it's A-u-b- -- I don't -- I don't
14 know what the next letter is, it could be an "a", a
15 "u" or "o" --

16 Q. Okay.

17 A. -- c-h-o-n, I believe, is the last part of
18 it.

19 Q. And when you say he previously was a
20 promotional manager, can you describe what that
21 position would entail?

22 A. There was a group in PPD in the late '80s
23 and very early '90s called National Accounts. They
24 had responsibility for products that were our older
25 products, products like K-Tab, products like the

Page 28

1 erythromycins.

2 Q. Uh-huh.

3 A. And one of res- -- vitamins, etcetera. The
4 product managers would come up with concepts for
5 doing -- I'll call them "deals" where you would
6 periodically offer a spe- -- have a special price
7 offering on a product to try and create some demand
8 in the marketplace for it, at a special price, like I
9 said.

10 Charlie worked with creative agencies
11 to develop materials to promote those deals, as well
12 as other things, to communicate information that they
13 wanted to try to communicate.

14 Q. Is it true that this position Mr. Aubuchon
15 held as promotional manager was a position that was
16 different from a product manager?

17 A. That's correct.

18 Q. Okay. Did you speak to anyone who
19 previously held any responsibilities as a product
20 manager for any of the erythromycin products?

21 A. I couldn't find any of those people. I
22 don't believe they're employed by Abbott any longer.

23 Q. Did Mr. Aubuchon have any information about
24 any promotional efforts on the Erys?

25 A. No, other than the -- the -- some of the

Page 29

1 creative things that he had done.

2 Q. So he -- he did recall some specifics about
3 different pieces or materials that had been created
4 for the Erys?

5 A. I did not get into a very detailed
6 discussion with him regarding all of the pieces he
7 had created.

8 Q. Uh-huh.

9 A. Quite frankly, the reason I spoke with
10 Charlie was because of something that had been
11 presented as a -- I'm sorry, what do you call the --

12 Q. Exhibit?

13 A. -- exhibit, thank you, in the Texas case.

14 Q. Which document, just generally?

15 A. I think it was the Texas case. It may have
16 been in Beth Gar- -- Beth Singer's deposition. It's
17 a piece regarding -- I -- I'm going to call it an
18 "Ery gang" piece, and it was regarding the
19 classification of the erythromycins as generics.

20 Q. And what did you learn from Mr. Aubuchon
21 about the Ery gang advertising piece?

22 MR. BERLIN: Objection, form.

23 A. That it preceded the time period that this
24 deposition covers.

25 Q. (BY MR. ANDERSON): When was that piece

8 (Pages 26 to 29)

<p style="text-align: right;">Page 30</p> <p>1 used in advertisements by Abbott?</p> <p>2 A. To Charlie's best recollection, it was</p> <p>3 created in the '88 to '91 time frame based on the</p> <p>4 files that he had, and -- but he -- he didn't know</p> <p>5 precisely where it was used or how it was used other</p> <p>6 than he had the -- the -- the mock-up for the piece.</p> <p>7 Q. What's your understanding of why that piece</p> <p>8 was created?</p> <p>9 MR. BERLIN: Objection, form, scope.</p> <p>10 A. I asked Charlie that same question, and all</p> <p>11 we can determine is from what it says. It says it's</p> <p>12 to make the marketplace, I'll say, aware of the fact</p> <p>13 that Abbott's erythromycins had been classified as</p> <p>14 generics.</p> <p>15 Q. (BY MR. ANDERSON): And in that context,</p> <p>16 the marketplace would be primarily pharmacies,</p> <p>17 correct?</p> <p>18 MR. BERLIN: Objection, scope.</p> <p>19 A. I -- I -- I don't know who all that piece</p> <p>20 was sent to, but it might have relevance to</p> <p>21 wholesalers as well as retailers.</p> <p>22 Q. (BY MR. ANDERSON): But it -- it -- at the</p> <p>23 minimum, certainly, retailers, including retail</p> <p>24 pharmacies, would be part of the marketplace for the</p> <p>25 Erys, correct?</p>	<p style="text-align: right;">Page 32</p> <p>1 MR. ANDERSON: Well, I actually have</p> <p>2 my copy, but it's all marked up.</p> <p>3 MR. BERLIN: Of the re- -- response?</p> <p>4 MR. ANDERSON: Yeah.</p> <p>5 MR. BERLIN: Okay. Then --</p> <p>6 MR. ANDERSON: Yeah.</p> <p>7 MR. BERLIN: He'll have this</p> <p>8 (indicating). I have a copy that's also marked up.</p> <p>9 MR. ANDERSON: Okay, good.</p> <p>10 MR. BERLIN: So we're all happy.</p> <p>11 MR. ANDERSON: Excellent.</p> <p>12 Q. (BY MR. ANDERSON): Okay.</p> <p>13 MR. BERLIN: So let me just tell --</p> <p>14 that -- that -- he -- he was going to read you the</p> <p>15 topics, but the topics essentially have been amended</p> <p>16 by the designations that we've made but also by an --</p> <p>17 a -- well, you know, we could do this as well,</p> <p>18 although he -- I don't think it's necessary since he</p> <p>19 outlined to -- to whom he spoke.</p> <p>20 MR. ANDERSON: Yeah.</p> <p>21 MR. BERLIN: So -- I -- he -- I just</p> <p>22 want to make sure that you were staying focused on</p> <p>23 the actual designations, which in s- -- for some</p> <p>24 topics narrow the -- the -- the actual topic to which</p> <p>25 you're designated. For some, it doesn't.</p>
<p style="text-align: right;">Page 31</p> <p>1 A. That's correct.</p> <p>2 Q. Okay. I'm going to -- I'm going to go</p> <p>3 through some of the topics, Mr. Fiske, and -- and</p> <p>4 I'll -- I'll read you the topic before we get into</p> <p>5 the specific questioning to help you frame what I'm</p> <p>6 talking about, okay?</p> <p>7 A. Okay.</p> <p>8 MR. BERLIN: Actually, if you're going</p> <p>9 to do that, I'm going to show him the response so</p> <p>10 that he can --</p> <p>11 MR. ANDERSON: Sure.</p> <p>12 MR. BERLIN: -- stay focused on the --</p> <p>13 you know, what the actual designation is.</p> <p>14 MR. ANDERSON: Yeah. In fact, if you</p> <p>15 want, we can mark it as an exhibit and --</p> <p>16 MR. BERLIN: Okay.</p> <p>17 MR. ANDERSON: You don't mind if I</p> <p>18 mark your copy, do you?</p> <p>19 MR. BERLIN: No, that's -- I can</p> <p>20 always make another copy.</p> <p>21 MR. ANDERSON: Yeah.</p> <p>22 (Exhibit 1 marked.)</p> <p>23 Q. (BY MR. ANDERSON): Okay.</p> <p>24 MR. BERLIN: Do you have -- do you</p> <p>25 want me to make you a copy of the --</p>	<p style="text-align: right;">Page 33</p> <p>1 THE WITNESS: Okay.</p> <p>2 MR. ANDERSON: I -- I don't want to</p> <p>3 get in an argument about it, Eric. I've -- I'll read</p> <p>4 the topics. I appreciate that in your responses</p> <p>5 you've started objections or limitations, and we --</p> <p>6 we'll deal with those as we approach them, okay?</p> <p>7 MR. BERLIN: Uh-huh.</p> <p>8 Q. (BY MR. ANDERSON): All right. I'm going</p> <p>9 to start with a -- I think a relatively easy one,</p> <p>10 Mr. Fiske. If you could, look at topic number 7</p> <p>11 which is on page 6?</p> <p>12 A. (Reviews document.)</p> <p>13 Q. And for the benefit of the record, I'll</p> <p>14 read it. "Abbott's efforts to evaluate or optimize</p> <p>15 the appropriate levels at which to set wholesale</p> <p>16 invoice prices for the Drugs. For instance, any</p> <p>17 efforts by Abbott to consider the impact of prompt</p> <p>18 pay discounts and/or the dollar volume of chargebacks</p> <p>19 processed; including the monitoring of Base Deal</p> <p>20 prices, wholesale acquisition costs, or other</p> <p>21 wholesale prices."</p> <p>22 Did you prepare to testify on behalf</p> <p>23 of Abbott as to this topic, sir?</p> <p>24 A. Yes, I did.</p> <p>25 Q. And who did you speak with, or what efforts</p>

9 (Pages 30 to 33)

<p style="text-align: right;">Page 34</p> <p>1 did you undertake to prepare to testify?</p> <p>2 A. Well, I'm the person in the Pricing and</p> <p>3 Contracting department that's responsible for</p> <p>4 directing the analytics related to these issues. So</p> <p>5 in general, I would be aware of any analytic- --</p> <p>6 analysis related to this.</p> <p>7 Q. Okay.</p> <p>8 A. I also, in -- in the course of preparing,</p> <p>9 reviewed at least one or more documents that</p> <p>10 discussed some evaluation of base deal pricing.</p> <p>11 Q. Was that a document that you understood had</p> <p>12 been marked as a deposition exhibit?</p> <p>13 A. I can't recall that it was a deposition</p> <p>14 exhibit or not. It may have been, but I don't</p> <p>15 recall.</p> <p>16 Q. How -- can you explain -- well, strike</p> <p>17 that. I'll back up.</p> <p>18 Does Abbott seek to evaluate the</p> <p>19 impact of prompt pay discounts paid by Abbott on</p> <p>20 wholesale invoice prices?</p> <p>21 A. General- --</p> <p>22 MR. BERLIN: Ob- -- I'm sorry.</p> <p>23 Just --</p> <p>24 THE WITNESS: Sure.</p> <p>25 MR. BERLIN: -- give me a chance to...</p>	<p style="text-align: right;">Page 36</p> <p>1 saw because, quite honestly, I wasn't able to draw</p> <p>2 much conclusion from it other than the fact that</p> <p>3 we -- we must have done an evaluation of possibly</p> <p>4 raising base deal price and -- but it -- but it</p> <p>5 wasn't done to determine the two-percent prompt pay</p> <p>6 discount. It was done to evaluate whether there was</p> <p>7 an opportunity to increase base deal pricing or not.</p> <p>8 Certainly when you -- when you are</p> <p>9 evaluating base deal pricing, it has -- it -- it may</p> <p>10 have an impact on a chargeback to a wholesaler that</p> <p>11 buys at base deal pricing. It may have a -- an</p> <p>12 impact on their prompt pay discount if they qualify</p> <p>13 for base deal pricing. But in the normal course of</p> <p>14 events, there wasn't much analysis done related to</p> <p>15 the impact of prompt pay discounts, and -- and</p> <p>16 chargebacks wasn't evaluated at all.</p> <p>17 Q. You also understand that you've been</p> <p>18 designated to testify about topic number 8, correct?</p> <p>19 A. (Reviews document.) Yes.</p> <p>20 Q. Can -- look -- in answering questions about</p> <p>21 topic number 7, it may actually help if we also</p> <p>22 discuss topic number 7. Can you des- --</p> <p>23 MR. BERLIN: 8.</p> <p>24 MR. ANDERSON: I mean 8, yes. Thank</p> <p>25 you.</p>
<p style="text-align: right;">Page 35</p> <p>1 Ob- -- objection to scope, and that --</p> <p>2 that objection is just that this says "Drugs," and</p> <p>3 the only way we really can narrow this as to time</p> <p>4 period and to define -- make sure that we're on the</p> <p>5 same page, that "Drugs" refer to the Erys indices</p> <p>6 named in the complaint.</p> <p>7 MR. ANDERSON: Yeah, that's fine.</p> <p>8 I'll do that.</p> <p>9 Q. (BY MR. ANDERSON): Sir, when -- when you</p> <p>10 were preparing to testify, you -- you recognized that</p> <p>11 the drugs that -- that are named in this case are</p> <p>12 erythromycin products, correct?</p> <p>13 A. Marketed and sold by the Pharmaceutical</p> <p>14 Products Division, I believe.</p> <p>15 Q. Yes, sir. Did you understand that?</p> <p>16 A. Yes.</p> <p>17 Q. Okay. And the time frame is from January</p> <p>18 of '94 to the present. Did you understand that?</p> <p>19 A. Yes, I did.</p> <p>20 Q. Okay. With those understandings, can you</p> <p>21 describe how, if at all, Abbott considers the impact</p> <p>22 of prompt pay discounts paid by Abbott to wholesalers</p> <p>23 on a -- based on wholesale invoice prices?</p> <p>24 A. There's not much evaluation done. The --</p> <p>25 the -- I will actually describe the document that I</p>	<p style="text-align: right;">Page 37</p> <p>1 Q. (BY MR. ANDERSON): Can you describe the</p> <p>2 reasoning behind Abbott instituting base deal pricing</p> <p>3 for the erythromycins?</p> <p>4 A. Nobody that I talked with could help me</p> <p>5 understand why base deal pricing was ever</p> <p>6 originated.</p> <p>7 Tip Parker, who is our Director of</p> <p>8 Trade Relations, has been in the industry for years.</p> <p>9 Back in 1981 time frame, if I've got the date correct</p> <p>10 in my mind, she worked for a company by the name of</p> <p>11 Gray Drug, and she seems to recall that base deal</p> <p>12 pricing may have existed as far back as then and that</p> <p>13 reps came in and discussed it with her. But she has</p> <p>14 no idea why it was ever developed, and it may have</p> <p>15 existed before it was ever presented to her.</p> <p>16 There's nobody -- as I indicated,</p> <p>17 there's nobody at Abbott that I've been able to speak</p> <p>18 with that can remember why base deal pricing was ever</p> <p>19 developed.</p> <p>20 MR. BERLIN: And just -- that -- that</p> <p>21 goes before the time period, but -- I mean, go ahead</p> <p>22 and question him about that, without -- we're not</p> <p>23 waiving the objection as to time period but it's --</p> <p>24 it- -- I mean --</p> <p>25 MR. ANDERSON: Okay.</p>

10 (Pages 34 to 37)

<p style="text-align: right;">Page 38</p> <p>1 MR. BERLIN: -- it's fine.</p> <p>2 Q. (BY MR. ANDERSON): What was the -- what --</p> <p>3 what was the time period that Ms. Parker recalls</p> <p>4 there may have been base deal pricing in place?</p> <p>5 A. She seems to remember from her days with</p> <p>6 Gray Drug, which was back in 1981, that base deal</p> <p>7 pricing may have existed all the way back then, and</p> <p>8 that Abbott sales representatives may have discussed</p> <p>9 it with her. She has a very vague rememory, she --</p> <p>10 or mem- -- memory, I'm sorry.</p> <p>11 Q. Uh-huh.</p> <p>12 A. She -- she couldn't tell me much more than</p> <p>13 to -- to think that she remembered that it existed</p> <p>14 all the way back then.</p> <p>15 Q. Okay. So back in the early '80s when</p> <p>16 Ms. Parker was a pharmacist with Gray Drug, she is</p> <p>17 saying there might have been base deal pricing in</p> <p>18 place then?</p> <p>19 A. I don't know what her official title was.</p> <p>20 Q. Uh-huh.</p> <p>21 A. She is a pharmacist by training.</p> <p>22 Q. Uh-huh.</p> <p>23 A. She was with Gray Drug.</p> <p>24 Q. Okay. Do you have an understanding or</p> <p>25 belief that base deal prices were utilized by Abbott</p>	<p style="text-align: right;">Page 40</p> <p>1 When we took a contract price</p> <p>2 increase, we -- on selected products, we would</p> <p>3 sometimes increase the base deal pricing.</p> <p>4 Q. What about when --</p> <p>5 A. By a -- by a same amount -- a similar</p> <p>6 percentage, I should say, not a similar amount.</p> <p>7 Q. Okay. So if the contract prices for the</p> <p>8 erythromycin products were going up, then the base</p> <p>9 deal prices would, in turn, go up?</p> <p>10 A. If the contract prices went up, at least --</p> <p>11 I believe in 2001 time frame, there was a -- a same</p> <p>12 percentage increase in the base deal pricing.</p> <p>13 Q. Not limited to the 2001 time frame, but</p> <p>14 just talking generally from 1994 to the present, is</p> <p>15 it true that as Abbott took contract price increases</p> <p>16 on the erythromycins, it would also typically take</p> <p>17 base deal price increases?</p> <p>18 A. I don't think that's true for every time.</p> <p>19 Q. Now, with respect to contract price</p> <p>20 decreases over time, when Abbott decreased contract</p> <p>21 prices, was there any effort to decrease base deal</p> <p>22 prices?</p> <p>23 MR. BERLIN: Objection, form.</p> <p>24 A. I don't believe that Abbott decreased</p> <p>25 contract prices in the time period '94 to present.</p>
<p style="text-align: right;">Page 39</p> <p>1 on the erythromycins to minimize prompt pay discounts</p> <p>2 paid to wholesalers?</p> <p>3 A. I don't know that that's a fact.</p> <p>4 Q. Do you have any reason to believe that base</p> <p>5 deal prices utilized for the erythromycin products</p> <p>6 did not effectively lower the prompt pay discounts</p> <p>7 paid by Abbott to wholesalers?</p> <p>8 A. Wholesalers that qualified for the deal, I</p> <p>9 already told you, and qualified for base deal pricing</p> <p>10 would have had a lower invoice price and, therefore,</p> <p>11 a lower prompt pay discount.</p> <p>12 Q. And so, in turn, that would have saved</p> <p>13 Abbott money that they would have been paying to</p> <p>14 wholesalers in the form of prompt pay discounts,</p> <p>15 correct?</p> <p>16 A. It would have reduced the deductions that</p> <p>17 wholesal- -- wholesalers took at the time they paid</p> <p>18 their invoice.</p> <p>19 Q. Now, back to topic number 7, Mr. Fiske,</p> <p>20 over the years from the mid '90s to July of 2003, are</p> <p>21 you aware of any efforts by Abbott to evaluate the</p> <p>22 appropriate levels for setting base deal prices?</p> <p>23 A. It -- I wouldn't describe it as an</p> <p>24 "appropriate level" to set base deal pricing. It</p> <p>25 wasn't quite that sophisticated.</p>	<p style="text-align: right;">Page 41</p> <p>1 I'm -- I could be mistaken, but I don't think that we</p> <p>2 did.</p> <p>3 Q. (BY MR. ANDERSON): Is that because the</p> <p>4 erythromycin drugs had been subject to generic</p> <p>5 competition in years prior to '94 and, therefore, had</p> <p>6 reached a market price equilibrium?</p> <p>7 MR. BERLIN: Objection, form.</p> <p>8 A. We evaluated a number of things in terms of</p> <p>9 the pricing of the erythromycins, we evaluated the</p> <p>10 competitive circumstances in the marketplace, we</p> <p>11 evaluated our own market share for the products and</p> <p>12 determined if we felt we could take price actions.</p> <p>13 Q. (BY MR. ANDERSON): I understand that. I'm</p> <p>14 asking a more straightforward question, which is:</p> <p>15 Prior to '94, the Erys had been subject to generic</p> <p>16 competition, correct?</p> <p>17 A. They have been subject to generic</p> <p>18 competition for the entire period of time under</p> <p>19 question as well as long before then.</p> <p>20 Q. Right. And as a result, the prices had</p> <p>21 plateaued, correct?</p> <p>22 MR. BERLIN: Objection, form.</p> <p>23 A. I -- I think that that's probably a fair</p> <p>24 characterization.</p> <p>25 Q. (BY MR. ANDERSON): And the reason for that</p>

11 (Pages 38 to 41)

<p style="text-align: right;">Page 42</p> <p>1 relatively static pricing in the marketplace on the 2 Erys is because once the competitors had all entered 3 and there had been price deterioration, then at some 4 point, the market leveled out, and the prices 5 remained relatively flat, correct? 6 MR. BERLIN: Objection, form. 7 A. As -- partly because some of the generic 8 competition withdrew from the marketplace, at least 9 as it relates to the Erys. 10 Q. (BY MR. ANDERSON): Well, right. There -- 11 there were generic competitors that entered in the 12 late '80s and the prices decreased significantly and 13 then the prices remained relatively flat for many 14 years. And then at some point in the 2000 time frame 15 or so some competitors began exiting the marketplace, 16 correct? 17 A. That's correct. 18 Q. And at that point, then, there was an 19 opportunity to actually take some marketplace 20 increases, correct? 21 A. On selected products. 22 Q. Right. Now, with that as a background, 23 going back to my question about evaluation of any 24 prompt pay discounts with respect to the base deal 25 prices, is it true that there really wasn't any</p>	<p style="text-align: right;">Page 44</p> <p>1 MR. BERLIN: -- assert the objection 2 to scope. 3 A. May I ask you to read back the question or 4 repeat the question? 5 Q. (BY MR. ANDERSON): Sure. I'll -- I'll -- 6 I'll rephrase it. 7 After launch of drugs by the PPD 8 division, does -- does PPD do anything to evaluate 9 the levels at which the WAC prices are set? 10 MR. BERLIN: Objection, scope. 11 A. Yes. 12 Q. (BY MR. ANDERSON): What? 13 MR. BERLIN: Objection, scope. 14 A. Abbott manage- -- I'm sorry. Abbott 15 monitors pricing actions on competitive products, not 16 only competitive products, but all of the top 50 to a 17 hundred pharmaceuticals. We monitor inflation rates, 18 we monitor our cost of goods sold, but the primary 19 focus is on competitive pricing. 20 In fact, we have a blended price model 21 that evaluates the price of our products relative to 22 competitive products, and we determine periodic -- 23 whether periodic price increases can be justified in 24 order to maximize revenues. 25 Q. And Abbott PPD is able to evaluate the</p>
<p style="text-align: right;">Page 43</p> <p>1 reason to evaluate the extent of the prompt pay 2 discounts on the base deal prices because the 3 market -- underlying market contract prices weren't 4 changing? 5 A. The fact is we generally don't evaluate the 6 impact of prompt pay discounts on any pricing we do. 7 Q. Okay. I'll -- I'll back up, then, and ask 8 a bigger question. Does Abbott evaluate the levels 9 at which it sets WAC prices on products after launch? 10 MR. BERLIN: Objection, scope. Are 11 you -- let me just -- I -- so I don't have to do 12 that, are all your questions -- can we interpret them 13 as limited to the erythromycin drugs? 14 MR. ANDERSON: Well, this is actually 15 a bigger question just talking about generally, so 16 this is not limited to the erythro- -- 17 MR. BERLIN: Okay. 18 MR. ANDERSON: I -- I'm doing that as 19 a way of background to go back to the Erys, but -- 20 MR. BERLIN: That's fair enough, 21 but -- 22 MR. ANDERSON: Yeah. 23 MR. BERLIN: -- we'll still assert 24 the -- 25 MR. ANDERSON: Yeah, of course.</p>	<p style="text-align: right;">Page 45</p> <p>1 possibility for price increases with respect to most 2 of its product line because most of its product line 3 is comprised of innovator brand drugs, correct? 4 MR. BERLIN: Objection, scope. 5 A. The majority of our products are innovator 6 brand drugs. 7 Q. (BY MR. ANDERSON): Now, with respect to 8 the erythromycin drugs which are marketed as generics 9 by Abbott, was there any effort, to your knowledge, 10 to evaluate the rates at which the wholesale prices 11 were being maintained? 12 MR. BERLIN: Objection, form. 13 A. To evaluate the level at which the 14 wholesaler prices were being maintained? 15 Q. (BY MR. ANDERSON): If -- if that's 16 confusing, I'll rephrase it. 17 A. Our efforts were focused on contract 18 pricing to our ultimate customers. 19 Q. The ultimate customers, being, for 20 instance, the chains? 21 A. The retailers. 22 Q. Including the chain pharmacies, correct? 23 A. Chain pharmacies are amongst the retailers 24 that our contracting efforts were focused on. 25 Q. Yes, sir. And then also the independent</p>

12 (Pages 42 to 45)

Page 46

1 pharmacy retailers, such as those that were members
2 of retail buying groups, correct?

3 A. That is correct.

4 Q. And that's why Abbott had specific prices
5 titled "chains" and specific prices titled "RBG
6 prices" which it contracted with retailers on the
7 Erys for, correct?

8 A. That's correct.

9 Q. But Abbott also maintained wholesale prices
10 known as "base deal" prices, correct?

11 MR. BERLIN: Objection, form.

12 A. There was an opportunity for wholesalers
13 and others to qualify for base deal pricing.

14 Q. (BY MR. ANDERSON): What efforts, if any,
15 did Abbott undertake to monitor the levels of those
16 prices?

17 A. To the best of my knowledge, we weren't
18 really monitoring those prices relative to
19 competitive prices.

20 Q. What information did Abbott consider in
21 setting those wholesale prices?

22 MR. BERLIN: You're referring to the
23 base deal prices?

24 MR. ANDERSON: Yeah. I'll make it
25 more specific.

Page 47

1 Q. (BY MR. ANDERSON): What information did
2 Abbott consider in setting the base deal prices for
3 the erythromycins from January of '94 through July of
4 2003?

5 A. To the best of my knowledge, based on my
6 personal experience with this, the only thing that we
7 ever did was, if we took a contract price increase,
8 we, at times, increased the base deal price by the
9 same percentage.

10 Q. With respect to the published WAC prices,
11 what information did Abbott consider in monitoring
12 those prices on the erythromycins from January of '94
13 through July of 2003?

14 A. We monitored inflation rates. We monitored
15 the competitive situation in terms of number of
16 competitors in the market share that we had based on
17 the contracting activities that we did. We had a lot
18 of that information.

19 And we took periodic price
20 adjustments, not annual, sometimes every few years.
21 I think we took a total of five in- -- five price
22 increases since 1994, ranging from maybe three
23 percent to as high as six percent.

24 Q. Why did Abbott raise the WAC prices on the
25 erythromycins five times, from 1994 to now?

Page 48

1 A. To maximize margin.

2 Q. How did the erythromy- -- pardon me.
3 Strike that.

4 How did the WAC prices on the
5 erythromycins relate to the prices paid by customers
6 to Abbott?

7 MR. BERLIN: Objection, form.

8 A. Well, there were customers that purchased
9 at WAC, there were customers that purchased at list
10 price, and there were customers that purchased at
11 contract price.

12 Q. (BY MR. ANDERSON): I have also reviewed
13 your testimony that's part of this case -- your prior
14 testimony that's part of this case, Mr. Fiske, and --
15 do you recall testifying that the WAC prices were
16 rarely sold by Abbott to wholesalers?

17 A. I'm not sure if I said that. We've always
18 had about five to ten percent of our sales at WAC or
19 list price for the erythromycins.

20 Q. "Always" for what time period?

21 A. I've been in Pricing since 1993, so I
22 believe that for the period that we're talking about,
23 that five to ten percent of our sales were at WAC
24 and, probably in more recent years, at an even higher
25 percentage.

Page 49

1 Q. Why would the percentage be higher in
2 recent years?

3 A. Fewer -- fewer competitors in the
4 marketplace.

5 Q. Is it true that in January of 2- -- I mean,
6 pardon me, July of 2003, Abbott discontinued base
7 deal prices for the erythromycins?

8 A. We did.

9 Q. So as a result, after July of 2003, any
10 sale to a wholesaler for erythromycin products would
11 be at WAC and only WAC, correct?

12 A. That's correct.

13 Q. So from July of 2003 to now, the published
14 WAC is on the invoice for the erythromycins, correct?

15 A. The invoice prices, the published WAC,
16 since mid-2003.

17 Q. But prior to July of 2003 and all the way
18 back to at least January of 1994, the large majority
19 of the transactions between Abbott and wholesalers
20 for the erythromycins resulted in the base deal price
21 being the wholesale invoice price, correct?

22 MR. BERLIN: Objection -- I'm sorry.
23 Objection, form.

24 A. Wholesalers who met the qualifications for
25 base deal pricing would have been invoiced at WAC --

13 (Pages 46 to 49)

Page 50

1 I'm sorry, at the base deal price.

2 Q. (BY MR. ANDERSON): And virtually all of
3 the wholesalers did meet those requirements, didn't
4 they?

5 MR. BERLIN: Objection, form.

6 A. A large number of wholesalers qualified for
7 that but not always from the -- not on all
8 purchases. An individual wholesaler could eventually
9 qualify for base deal pricing but not qualify it for
10 the entire year. It depends upon their purchase
11 patterns.

12 Q. (BY MR. ANDERSON): Why did Abbott
13 discontinue invoicing wholesalers at base deal price
14 on the erythromycins?

15 A. Our contracts expired mid-year 2003 on the
16 erythromycins. And we had done a significant
17 evaluation of the competitive situation and took very
18 significant price increases on at least three of the
19 different presenta- -- "salts" I'll call them, okay,
20 Ery base, Ery stearate, and especially Ery-Tab, where
21 prices were increased from 20 percent to as high as I
22 believe 150 percent of the previous contract price.

23 The new prices exceeded the base deal
24 pricing that was out there, and we decided to
25 eliminate the base deal pricing.

Page 51

1 Q. How did Abbott ascertain the appropriate
2 levels to set the WAC prices after July of 2003 on
3 the erythromycins?

4 A. It was somewhat speculative in terms of
5 what we thought we could -- if you want to call it
6 "take" and still be able to sell our products based
7 on the market share that we had and the number of
8 competitors that were selling the same salt.

9 Q. Is it true that not all of the underlying
10 contract prices on the erythromycins were increased
11 to levels above the existing base deal prices in
12 Ju- -- July of 2003?

13 A. Not all of the salts were increased, that's
14 correct.

15 Q. For those products where the underlying
16 contract prices were not increased above base deal
17 prices, why were the base deal prices discontinued?

18 A. We just decided to eliminate base deal
19 pricing completely.

20 Q. I understand that it was decided that all
21 base deal prices would be discontinued, but do you
22 have any information that explains why the base deal
23 prices were discontinued for the products where the
24 contract prices were not being increased above the
25 existing base deal price?

Page 52

1 A. I re- -- I can't recall the math, so I'd
2 have to look at something. But I -- I -- I -- to
3 have increased the base deal prices on the products
4 that we took the 150-percent price increases on by a
5 similar percentage, I believe, would have put the
6 base deal pricing above WAC, and we just decided to
7 eliminate the base deal pricing completely.

8 Q. In that answer, you're referencing a
9 situation where -- well, strike that.

10 What math are you talking about?

11 A. I told you previously in my testimony that
12 when we took previous increases on products, we took
13 a similar percentage change in the base deal price.
14 I told you that I took 150-percent price increases on
15 Ery-Tab.

16 Q. Right. I understand. I'm -- my questions
17 now, sir, are limited to the products for which the
18 price increases were not 150 percent.

19 A. It was -- it was just a decision to
20 eliminate it completely because it -- it -- like I
21 just described, what would have happened -- for
22 example, if you do the math, Ery-Tab was priced at
23 about a six -- the -- the base deal pricing for
24 Ery-Tab, I believe, was around 60 percent -- I
25 mean -- let me make sure I've got this right in my

Page 53

1 mind.

2 I -- I -- I can't do this, but the --
3 a decision was simply made to eliminate the base deal
4 pricing.

5 MR. BERLIN: Do you need a break?

6 THE WITNESS: Sure.

7 MR. BERLIN: Do you need a break?

8 THE VIDEOGRAPHER: We are off the
9 record at 10:11 a.m. This is the end of tape 1.

10 (Recess taken.)

11 (Exhibits 2-4 marked.)

12 THE VIDEOGRAPHER: We are back on the
13 record at 10:24 a.m. This is the beginning of tape
14 2.

15 Q. (BY MR. ANDERSON): Mr. Fiske, I'm going to
16 show you some documents that may assist you in this
17 line of questions. They are marked as Fiske Exhibit
18 2, 3, and 4. Exhibit 2 is a two-page document Bates
19 labeled ABT_ERY-E00024993 and 94, and the other two
20 documents are prior deposition exhibits.

21 A. (Reviews documents.)

22 MR. BERLIN: And he's going to hand me
23 a copy, I believe, right, Jarrett?

24 MR. ANDERSON: Yes. And, Eric,
25 there's a set for you (indicating).

14 (Pages 50 to 53)

Page 54

1 MR. BERLIN: Those are 2 -- 2, 3, and
 2 4; is that what you're saying?
 3 MR. ANDERSON: Right, and they're in
 4 order.
 5 MR. BERLIN: And we're -- we're still
 6 on the same topics?
 7 MR. ANDERSON: Yes.
 8 MR. BERLIN: Okay.
 9 Q. (BY MR. ANDERSON): So directing your
 10 attention to Exhibit 2, Mr. Fiske, have you seen this
 11 document before?
 12 MR. BERLIN: And he's --
 13 A. I'm sorry. Which one --
 14 MR. BERLIN: -- talking --
 15 A. -- please?
 16 MR. BERLIN: -- well --
 17 Q. (BY MR. ANDERSON): Exhibit 2.
 18 A. I don't know that I have or not. I may
 19 have. Not recently.
 20 Q. Okay. Exhibit 3 and Exhibit 4, have you
 21 seen those before?
 22 A. I -- I know I've seen Exhibit 4. I may
 23 have also seen Exhibit 3.
 24 Q. Did you review Exhibit 3 and 4 in preparing
 25 to testify?

Page 55

1 A. I know I reviewed Exhibit 4 in preparing to
 2 testify. It indicates that Exhibit 3 was part of
 3 the -- a -- an exhibit shown in the Garvin
 4 deposition. I reviewed the Garvin deposition, so I
 5 must have seen the document before.
 6 Q. Okay. You've referenced this morning that
 7 in July of 2003 there were some price increases taken
 8 on erythromycin products, correct?
 9 A. Yes, that's correct.
 10 Q. Looking at Exhibit 2 -- and I've found,
 11 Mr. Fiske, that the best way to review Exhibit 2 is
 12 to -- is to possibly disconnect the page and overlay
 13 it, or just bend it back (indicating). But the way
 14 the spreadsheet printed out, in order to make the
 15 columns line up, you have to have them side by side.
 16 But in looking at Exhibit 2, do you --
 17 do you see some price increases noted there?
 18 A. I do.
 19 Q. And it appears that the price increases for
 20 the Ery-Tab's were the most significant; is that
 21 correct?
 22 A. That's correct.
 23 Q. And is that true; that the price increases
 24 on the Ery-Tab's were the most significant in relation
 25 to the other Erys in July of 2003?

Page 56

1 A. The contract price increases were the most
 2 significant, yes.
 3 Q. And looking at the last column on the
 4 right-hand side of Exhibit 2, the change percentages
 5 are shown there of the net price changes for the
 6 different products, correct?
 7 A. Yes.
 8 Q. In looking down the column about --
 9 MR. BERLIN: Actually, Jarrett,
 10 I'm sorry to interrupt you. Just to voice an
 11 objection --
 12 MR. ANDERSON: Sure.
 13 MR. BERLIN: -- is to the scope --
 14 MR. ANDERSON: Okay.
 15 MR. BERLIN: -- because I don't know
 16 that you have one that goes to contract. But go
 17 ahead and question, but let me have the objection
 18 just so --
 19 MR. ANDERSON: Okay.
 20 MR. BERLIN: I don't -- I don't think
 21 it's particularly material. I think he can --
 22 MR. ANDERSON: All right.
 23 MR. BERLIN: -- testify about that,
 24 but...
 25 Q. (BY MR. ANDERSON): And, sir, if you could,

Page 57

1 go down about the ninth entry which pertains to the
 2 drug Erythromycin Stearate 500 milligrams?
 3 A. Yes.
 4 Q. And I think it has a product code of -- of
 5 6316. Are you with me?
 6 A. Yes.
 7 Q. I notice there that the contract price
 8 taken on that erythromycin was only three percent,
 9 correct?
 10 A. Correct.
 11 Q. And the WAC price that is shown that was
 12 effective in August of 2003 for that drug is \$21.08,
 13 correct?
 14 A. Yes.
 15 Q. Now, if you could, look at Fiske Exhibit
 16 3. And for that same drug, which is near the lower
 17 third of the document, do you see there a -- a WAC
 18 price that's being listed of 21.08?
 19 A. Yes.
 20 Q. And that's consistent with the WAC price on
 21 Fiske Exhibit 2 for that drug, correct?
 22 A. It is.
 23 Q. And then if you could, look at Fiske
 24 Exhibit 4 and toward the lower middle portion of the
 25 page for the Erythrocin Stearate product with the

15 (Pages 54 to 57)

<p style="text-align: right;">Page 58</p> <p>1 labeler co- -- I mean, of -- pardon -- pardon me, the 2 product code of 6316, case price is listed of 21.08, 3 correct? 4 A. Yes. The case price is the same as our WAC 5 price. 6 Q. And then to the far right-hand column is 7 the base deal price that was in an -- effect up until 8 June 30th of 2003 of \$14.50, correct? 9 A. Correct. 10 Q. And the -- there's a percentage shown there 11 that appears to represent the percentage discount off 12 of the WAC price down to the base deal price, 13 correct? 14 A. Yes. 15 Q. Why did Abbott choose to begin invoicing 16 the wholesalers at \$21.08 in July of 2003 when the 17 underlying contract price for that product was only 18 going up roughly three percent? 19 A. As I had testified earlier, we eliminated 20 base deal pricing on all products in July of '03. 21 Q. Why was the base deal price eliminated for 22 all products, even those that weren't experiencing 23 significant market price increases? 24 MR. BERLIN: Objection, asked and 25 answered.</p>	<p style="text-align: right;">Page 60</p> <p>1 Q. (BY MR. ANDERSON): After July of 2003 when 2 base deal pricing was discontinued, did wholesalers 3 complain? 4 A. I didn't hear of any complaints. 5 Q. Are you aware of any complaints? 6 A. You know, I didn't specifically ask Tip 7 Parker that question, so I -- I don't know whether 8 there were any complaints. I -- I'm not aware of 9 any. 10 Q. Did the discontinuation of base deal price 11 impact the way in which Abbott reported prices to 12 price compendias such as First State Bank and 13 Red Book? 14 A. No. We have always reported our published 15 WAC and list price to the pricing compendia. 16 Q. Did Abbott ever consider publishing its 17 base deal pricing to the compendia? 18 A. No. 19 Q. Why not? 20 A. It wasn't our WAC or our list price. 21 That's all we reported to the pricing compendia. 22 Base deal price was a discounted price. We don't 23 ever report discounted pricing. 24 Q. In what way was base deal price, when it 25 was in effect, discounted?</p>
<p style="text-align: right;">Page 59</p> <p>1 A. You know, our base deal price provided that 2 you had to purchase \$500 dollars worth of 3 erythromycins in order to qualify for it. 4 It -- with all the changes we were 5 making in contract pricing, I think it would have 6 just been very confusing to people to have some with 7 and some without base deal. We just eliminated base 8 deal pricing at that time completely. 9 Q. (BY MR. ANDERSON): It would have been 10 confusing to have some products that had base deal 11 pricing and some products that did not? 12 A. Yes. 13 Q. When Abbott chose to discontinue all base 14 deal pricing -- strike that. 15 Over the years when Abbott has 16 published base deal pricing to wholesalers, have the 17 wholesalers complained? 18 MR. BERLIN: Objection, form. 19 A. Not that I've heard. 20 MR. BERLIN: I'm sorry. You -- I 21 wasn't done with my objection. 22 THE WITNESS: I'm sorry. Excuse me. 23 MR. BERLIN: I'm sorry. Objection, 24 form and scope. Go ahead. 25 THE WITNESS: I apologize.</p>	<p style="text-align: right;">Page 61</p> <p>1 A. You had to qualify for it by meeting 2 purchase -- certain purchase requirements, and it was 3 a -- effectively, a contract price. 4 Q. Were there contracts for base deal pricing? 5 A. It was a deal that was offered and loaded 6 into our pricing systems, and it was communicated to 7 the wholesalers in terms of what they needed to do to 8 qualify. 9 Q. Do you recall testifying previously that 10 there was a time period for which base deal pricing 11 was qualified for automatically? 12 A. Yeah. I actually do recall testifying to 13 that, and after I went back and talked with people in 14 preparation for this case, I found out that I was 15 wrong. There were always qualifications loaded into 16 the system that they had to meet in order to qualify 17 for it. 18 Q. Is it -- 19 A. Our system would not allow the discount to 20 occur unless they actually purchased the minimum 21 requirements. 22 Q. Right. Did -- do you think the reason you 23 had the impression that the qualification for base 24 deal was automatic was a result of the fact that the 25 wholesalers always qualified?</p>

16 (Pages 58 to 61)

Page 62

1 A. No, because they didn't always qualify. I
2 think I was mistaken.
3 Q. Did -- did you review any documents in
4 preparing to testify that indicated to you the
5 billing system that PPD utilized was using the base
6 deal pricing to invoice wholesalers?
7 MR. BERLIN: Objection, form.
8 A. Could you repeat the question, please?
9 Q. (BY MR. ANDERSON): Did you review any
10 information in preparing to testify that indicated to
11 you that the billing system that PPD utilized in
12 billing wholesalers was populating the invoices to
13 wholesalers with base deal pricing?
14 MR. BERLIN: Objection, form, and it
15 mischaracterizes the evidence.
16 A. I don't know what you're representing to
17 me. If you're representing to me that the billing
18 system charged base deal pricing when they didn't
19 qualify for it, I'm not aware of that because I
20 was -- the way the deal was loaded in the system,
21 that should never have occurred. It was an error if
22 that ever did occur.
23 As I explained to you, the deal was
24 loaded into the system with a qualification that they
25 must purchase a minimum of \$500 on a single invoice

Page 63

1 before they could ever qualify.
2 Q. (BY MR. ANDERSON): I -- yeah. I
3 understand that testimony.
4 MR. ANDERSON: Objection,
5 nonresponsive.
6 Q. (BY MR. ANDERSON): And I'm not
7 representing to you anything. I'm asking a question,
8 which is: Did -- did you review any information that
9 indicated to you that the billing system utilized by
10 PPD was billing wholesalers at base deal price?
11 A. To the best of my knowledge, wholesalers
12 who qualified for base deal pricing were invoiced at
13 base deal pricing. Those that did not were billed at
14 WAC price.
15 Q. (BY MR. ANDERSON): Did you gain any
16 information about the frequency with which
17 wholesalers were billed at WAC price while Abbott had
18 base deal prices in effect on the erythromycins?
19 A. I --
20 MR. BERLIN: Objection, form.
21 A. As I testified earlier, I told you that
22 there were always five to ten percent of our sales at
23 WAC or list price. Some of those sales were to
24 wholesalers. And as you've even presented to me,
25 since July of 2003, all -- all sales to wholesalers

Page 64

1 were at WAC price.
2 Q. (BY MR. ANDERSON): What information do you
3 base the testimony upon that about five to ten
4 percent of the erythromycin sales prior to July of
5 2003 were at WAC price?
6 A. Sometime ago, I had been working with
7 outside counsel related to --
8 THE WITNESS: Is -- am I violating
9 privilege?
10 MR. BERLIN: Well, I think we should
11 talk about it. I think we need to go off the record
12 if he's concerned about privilege and -- because I --
13 I -- I can't answer that sitting here.
14 THE WITNESS: Okay.
15 MR. BERLIN: We need to --
16 THE WITNESS: I'm sorry.
17 MR. BERLIN: -- go outside --
18 THE WITNESS: I think I may be
19 violating privilege. Can we go off the record?
20 THE VIDEOGRAPHER: We're off the
21 record at 10:39 a.m.
22 (Off the record.)
23 THE VIDEOGRAPHER: We are back on the
24 record at 10:41 a.m.
25 MR. BERLIN: Why don't you ask a

Page 65

1 question, and then we'll go from there?
2 MR. ANDERSON: Okay.
3 MR. BERLIN: And -- and there is some
4 sensitivity as to attorney-client and work product in
5 this general area, so if you can sort of try to
6 phrase it to not get into that, and then I'll give
7 you slack to try to get to the information --
8 MR. ANDERSON: Okay.
9 MR. BERLIN: -- you're seeking.
10 Q. (BY MR. ANDERSON): Other than
11 communications with attorneys, have -- do you have
12 any information to support your statement that prior
13 to July of 2003 approximately five to ten percent of
14 the erythromycin sales were at WAC price?
15 MR. BERLIN: Well, I know you're
16 trying, and I'm going to try to -- I'm going to
17 object to attorney-client privilege and work product
18 doctrine. I mean, he was doing some analyses for
19 attorneys --
20 MR. ANDERSON: Uh-huh.
21 MR. BERLIN: -- and -- and that's -- I
22 mean, that's part of the issue that's here.
23 So the way that you phrase it, I don't
24 know that he can answer it in that way. I'm trying
25 to get it so you can get at -- I mean the bottom line

17 (Pages 62 to 65)

<p style="text-align: right;">Page 66</p> <p>1 is he did some analyses --</p> <p>2 MR. ANDERSON: Uh-huh.</p> <p>3 MR. BERLIN: -- he did some</p> <p>4 spot-checking --</p> <p>5 MR. ANDERSON: Uh-huh.</p> <p>6 MR. BERLIN: -- and the spot-checking</p> <p>7 indicated in that it was five to ten percent.</p> <p>8 Although -- I -- I -- I -- you know,</p> <p>9 the -- the numbers are going to bear out what it</p> <p>10 was. You know what I mean? You have data and we</p> <p>11 have data, and we can run and determine what --</p> <p>12 MR. ANDERSON: Uh-huh.</p> <p>13 MR. BERLIN: -- what the sales were,</p> <p>14 so, I mean, it is what it is.</p> <p>15 I just want to -- I say that because I</p> <p>16 don't want to -- I -- I'm not preventing you from</p> <p>17 getting at the underlying data that will answer your</p> <p>18 question, and I want the record to be clear about</p> <p>19 that, because if I were and it were the only way that</p> <p>20 you could get at the data, that would be a slightly</p> <p>21 different issue. But the bottom line is we can each</p> <p>22 go home and run the data and it will tell us what the</p> <p>23 actual sales of WAC were.</p> <p>24 MR. ANDERSON: Okay.</p> <p>25 Q. (BY MR. ANDERSON): Other than your work</p>	<p style="text-align: right;">Page 68</p> <p>1 was asking my question.</p> <p>2 What types of customers were pur- --</p> <p>3 well, can you approximate what percentage of the WAC</p> <p>4 sales prior to July of 2003 were to wholesalers or</p> <p>5 pharmacies?</p> <p>6 A. I didn't analyze it in that level of</p> <p>7 detail. Most of our direct buying customers are</p> <p>8 wholesalers or pharmacies.</p> <p>9 Q. Yes, I understand that, and I'm -- I'm</p> <p>10 trying to ascertain if you know the breakdown of the</p> <p>11 WAC sales prior to July of 2003 and which customers</p> <p>12 were purchasing at WAC.</p> <p>13 Were they primarily wholesalers, or</p> <p>14 were they primarily pharmacies who were buying cases?</p> <p>15 A. I haven't done that analysis.</p> <p>16 Q. Do you know for what time period the OPS</p> <p>17 system was in place at PPD?</p> <p>18 A. No, I do not.</p> <p>19 Q. Do you have approximate time range for when</p> <p>20 the SAP system was utilized in PPD?</p> <p>21 MR. BERLIN: Objection to scope as to</p> <p>22 both questions. Go ahead.</p> <p>23 A. Oh, boy. SAP? I think -- did we acquire</p> <p>24 SAP with -- I think around maybe 2001 time frame when</p> <p>25 we acquired Knoll, I -- I think. That's the best</p>
<p style="text-align: right;">Page 67</p> <p>1 with attorneys or for attorn- -- at the direction of</p> <p>2 attorneys, do you have any information to support</p> <p>3 your belief that prior to July of 2003 roughly five</p> <p>4 to ten percent of the erythromycin sales were at WAC?</p> <p>5 A. No.</p> <p>6 Q. When -- well, strike that.</p> <p>7 What types of customers were</p> <p>8 purchasing the erythromycin products at WAC in that</p> <p>9 situation prior to July of 2003 where five to ten</p> <p>10 percent of the sales were at WAC?</p> <p>11 A. There were wholesalers that purchased at</p> <p>12 WAC --</p> <p>13 Q. Uh-huh.</p> <p>14 A. -- those that did not qualify for the base</p> <p>15 deal pricing. Our WAC pricing is also available to</p> <p>16 any contract -- non-contract customer who purchases</p> <p>17 in a full case quantity, thus the "case price". It's</p> <p>18 the same as WAC.</p> <p>19 And entities other than wholesalers</p> <p>20 who purchased -- who did not have a contract price</p> <p>21 and purchased less than a full case quantity</p> <p>22 purchased at list price --</p> <p>23 Q. Yes, sir --</p> <p>24 A. -- if they purchased directly from Abbott.</p> <p>25 Q. Yes, sir, I understand that. That's why I</p>	<p style="text-align: right;">Page 69</p> <p>1 recollection I have. I may be mistaken.</p> <p>2 Q. (BY MR. ANDERSON): Do you recall any issue</p> <p>3 with the computer systems or billing systems that PPD</p> <p>4 utilized which prevented a WAC price from being used</p> <p>5 in invoicing customers for the sale of erythromycins?</p> <p>6 MR. BERLIN: Objection, scope.</p> <p>7 A. Do I have knowledge of any problems with</p> <p>8 the computer system that would have prevented us from</p> <p>9 using WAC for billing the erythromycins? Was that</p> <p>10 your question to me?</p> <p>11 Q. (BY MR. ANDERSON): Yes, sir.</p> <p>12 A. No.</p> <p>13 (Exhibit 5 marked.)</p> <p>14 Q. (BY MR. ANDERSON): If you could,</p> <p>15 Mr. Fiske, please review what's been marked as Fiske</p> <p>16 Exhibit 5.</p> <p>17 A. (Reviews document.) Okay.</p> <p>18 Q. Have you seen this document before?</p> <p>19 A. I may have seen this document before.</p> <p>20 This -- it says it was part of Garvin deposition. I</p> <p>21 probably did see it before.</p> <p>22 Q. It -- the -- the memo is titled "Ery Deal</p> <p>23 Issue in CPCC" November 13th, 2002, correct?</p> <p>24 A. Yes.</p> <p>25 Q. After reviewing this exhibit, does this</p>

18 (Pages 66 to 69)

<p style="text-align: right;">Page 70</p> <p>1 refresh your memory in any way with some billing 2 issues that existed regarding the Erys? 3 A. Only to the extent that I saw this document 4 before when I looked at the Garvin deposition. I 5 was -- I -- I don't recall being aware of the issue 6 at the time. 7 Q. Okay. Did you do anything subsequent to 8 your review of this document recently, in the context 9 of your review of the Garvin deposition, to get to 10 the bottom of this issue? 11 A. No, I did not. 12 Q. Specifically, did you undertake any efforts 13 to understand how the actual billings have occurred 14 over the years for the erythromycins? 15 A. No, I did not. 16 Q. Looking at the bullet number 1, or 17 paragraph number 1 in Fiske Exhibit 5, it reads, 18 "When the Ery deal was set up in OPS, the customers 19 qualified quickly for the deal price by purchasing 20 \$500 of product within the first invoice." Did I 21 read that correctly? 22 A. That's what it says on this paper. 23 Q. And is that a correct statement as to how 24 the Ery deal worked in the past? 25 A. This implies, if you read it quickly and</p>	<p style="text-align: right;">Page 72</p> <p>1 A. I did not go back and look at invoices for 2 every customer early in the year, if that's your 3 question, to confirm that. 4 Q. Well, I'm -- my question is -- 5 A. I'm basing it on the -- 6 Q. Yeah. 7 A. -- on -- on the work that was done with the 8 attorneys. 9 MR. ANDERSON: Eric, I feel like I've 10 got to do this in order to cover my bases, and -- and 11 I understand if you as- -- you assert privilege, 12 that's your right and we can hash that out later. 13 Q. (BY MR. ANDERSON): But, sir, can you 14 describe to me the findings that you reached in 15 working with the attorneys concerning the frequency 16 where which WAC prices were used to bill wholesalers 17 for the erythromycins? 18 MR. BERLIN: Objection. We will 19 assert the attorney-client privilege and attorney 20 work product doctrine, and I'll instruct you not to 21 answer. 22 Q. (BY MR. ANDERSON): Will you abide by that 23 instruction? 24 A. I will. 25 MR. BERLIN: And let me just add, just</p>
<p style="text-align: right;">Page 71</p> <p>1 don't understand the situation, that maybe all 2 customers -- not all customers did qualify for the 3 deal by purchasing \$500 of product on the first 4 invoice. I know that for a fact. 5 Q. How do you know that? 6 A. Pardon me? 7 Q. How do you -- 8 A. Because there were wholesalers that did not 9 purchase \$500 of product on the first invoices during 10 the year, and some of them did not qualify until 11 sometime later in the year. Some didn't qualify. 12 Q. How do you know that some wholesalers prior 13 to July of 2003 did not qualify for the deal price at 14 all? 15 A. I told you earlier in my testimony, and 16 this is true, that there were wholesalers -- there 17 were always some wholesalers that were paying WAC 18 price for our product. That's because they did not 19 qualify for the base deal pricing. The qualification 20 was to purchase \$500 on a single invoice. 21 Q. Right. I understand that. I'm -- I'm 22 asking -- and I'm -- I'm not trying to invade the 23 work you did with attorneys, but other than any work 24 you did with attorneys, how do you know that that's 25 true?</p>	<p style="text-align: right;">Page 73</p> <p>1 because -- I'm not just doing this for the sake to 2 have a fight over attorney-client privilege, I mean, 3 I just feel like we need to preserve that. You know, 4 we are -- I -- we have -- we have to, I mean, but 5 it's not that I'm trying to prevent you from getting 6 at the underlying information. 7 And so I -- you know, I think we both 8 have an ability to crunch the data because we've 9 produced that data to you. So you can go and see -- 10 I mean, the sales are going to be what -- and I've 11 kind of been -- I -- 12 And, again, I'm not looking for an 13 argument, so I probably shouldn't editorialize, but 14 I've been curious that you've been asking all the 15 witnesses this because you can just go and whatever 16 they think, I mean, is going to get trumped by 17 whatever the data says which we, you know, believe 18 was kept in the normal course of business. 19 So I think you'd have a potential 20 argument to get it if you didn't have access to that 21 data, but I know you do, so I think that's an 22 important part of our ability to assert the 23 privilege. 24 Q. (BY MR. ANDERSON): Looking at the -- well, 25 strike that. I've got some specific questions about</p>

<p style="text-align: right;">Page 74</p> <p>1 this -- this deal requirement.</p> <p>2 The -- the requirement was to purchase</p> <p>3 \$500 of product; is that true?</p> <p>4 A. On a single purchase order, single</p> <p>5 invoice.</p> <p>6 Q. And -- and which products were part of the</p> <p>7 basket of products that had to total to \$500?</p> <p>8 A. There were a number of them. I -- I could</p> <p>9 refer you back to the Ery contract pricing document,</p> <p>10 Exhibit No. 2, that lists most of those products,</p> <p>11 if -- if not all of them.</p> <p>12 Q. Okay. And so they were -- they were Ery</p> <p>13 products, and if a wholesaler purchased \$500 of those</p> <p>14 Ery products in total on an invoice, they would</p> <p>15 qualify for the deal price, correct?</p> <p>16 A. That's correct.</p> <p>17 Q. And you mentioned that they may not qualify</p> <p>18 on the first invoice, but they may qualify</p> <p>19 subsequently. Can you describe how that would</p> <p>20 happen?</p> <p>21 A. So -- if they purchased \$300 today and they</p> <p>22 purchased another \$200 next week, it wouldn't be</p> <p>23 until they actually had purchased the total -- in</p> <p>24 individual purchased the total 500. The first ones</p> <p>25 don't count.</p>	<p style="text-align: right;">Page 76</p> <p>1 not?</p> <p>2 A. Yes.</p> <p>3 Q. Okay. So a wholesaler could purchase \$500</p> <p>4 early in the year, qualify for base deal on that</p> <p>5 particular invoice, and then also ensure that they</p> <p>6 would qualify for all future invoices for</p> <p>7 erythromycins for the remainder of the year, correct?</p> <p>8 A. They could.</p> <p>9 Q. And that -- theoretically, they could be</p> <p>10 purchasing the remainder of their erythromycin</p> <p>11 products in \$20 increments per invoice and still</p> <p>12 receive the deal prices, correct?</p> <p>13 A. Theoretically.</p> <p>14 Q. Okay. Now, shifting gears slightly,</p> <p>15 Mr. Fiske. Is it true that most wholesalers, because</p> <p>16 they're buying in bulk and then, in turn,</p> <p>17 distributing out to pharmacies and other customers</p> <p>18 such as hospitals, could easily achieve the \$500</p> <p>19 erythromycin deal threshold?</p> <p>20 MR. BERLIN: Objection, form.</p> <p>21 A. They could if they were thoughtful enough</p> <p>22 to do that.</p> <p>23 Q. (BY MR. ANDERSON): And -- and one of the</p> <p>24 mechanisms by which Abbott notified them of this</p> <p>25 requirement was through publication of documents such</p>
<p style="text-align: right;">Page 75</p> <p>1 Q. And ag- -- once they hit the \$500 aggregate</p> <p>2 upon the second invoice, for instance, then from that</p> <p>3 second invoice forward for the rest of the year, they</p> <p>4 would be receiving deal prices, correct?</p> <p>5 A. I want to make sure you didn't</p> <p>6 misunderstand me, because the way you positioned it,</p> <p>7 you may have. I -- because the example I gave was</p> <p>8 300 and 200 --</p> <p>9 Q. Uh-huh.</p> <p>10 A. -- and maybe I should have given an example</p> <p>11 of 300 and 300. That does not constitute 500 in the</p> <p>12 aggregate. It's not until they purchase 500 on a</p> <p>13 single invoice that they would qualify, and that may</p> <p>14 be many purchases later.</p> <p>15 Q. Okay. So whether it's the first invoice,</p> <p>16 the second invoice or the 22nd invoice, once a</p> <p>17 wholesaler purchases \$500 of erythromycin products,</p> <p>18 they qualify for the deal price?</p> <p>19 A. Once they purchase 500 on a single invoice,</p> <p>20 they would qualify.</p> <p>21 Q. Right. And once they qualify on that</p> <p>22 single invoice, do they qualify, then, for the</p> <p>23 remainder of the year?</p> <p>24 A. Yes, they do.</p> <p>25 Q. Regardless of whether they purchase \$500 or</p>	<p style="text-align: right;">Page 77</p> <p>1 as Exhibit 16, correct? I mean -- I'm using a -- an</p> <p>2 exhibit I haven't marked yet, Exhibit 6, and I'll</p> <p>3 allow you to look at it, of course.</p> <p>4 (Exhibit 6 marked.)</p> <p>5 Q. (BY MR. ANDERSON): You previously reviewed</p> <p>6 this in your other deposition. It was Exhibit 536.</p> <p>7 A. (Reviews document.)</p> <p>8 MR. BERLIN: I apologize. I lost the</p> <p>9 question in that.</p> <p>10 Q. (BY MR. ANDERSON): The question was: Is</p> <p>11 Exhibit 6 an example of the mechanism by which Abbott</p> <p>12 would notify the wholesalers of the deal</p> <p>13 requirements?</p> <p>14 A. I -- I -- I don't know whether this</p> <p>15 specific document was used for that purpose, but a</p> <p>16 similar document, yes.</p> <p>17 Q. That would state the terms such as those</p> <p>18 stated above in the first paragraph, correct?</p> <p>19 A. Yes.</p> <p>20 Q. All right. Now back to Exhibit 5,</p> <p>21 Mr. Fiske. In looking at paragraph 3, I'm going to</p> <p>22 read the second -- no, pardon me, the third sentence</p> <p>23 beginning with the acronym "CPCC".</p> <p>24 Well, first, let me ask a couple of</p> <p>25 background questions. CPCC is a computer system</p>

20 (Pages 74 to 77)

<p style="text-align: right;">Page 78</p> <p>1 utilized by Abbott, correct?</p> <p>2 A. It is.</p> <p>3 Q. And, similarly, OPS was a computer system</p> <p>4 utilized by Abbott, correct?</p> <p>5 A. Yes.</p> <p>6 Q. And same, SAP also was utilized by</p> <p>7 Abbott --</p> <p>8 A. Correct.</p> <p>9 Q. -- correct?</p> <p>10 A. Correct.</p> <p>11 Q. And all of those systems were utilized in</p> <p>12 maintaining pricing information and/or billing</p> <p>13 customers, correct?</p> <p>14 A. That's correct.</p> <p>15 Q. And the computers would interface with one</p> <p>16 another to share the pricing information that would</p> <p>17 be billed to a customer when they placed an order,</p> <p>18 correct?</p> <p>19 A. Yes.</p> <p>20 Q. Okay. Now, reading the third sentence of</p> <p>21 the third paragraph in Exhibit 5, quote, "CPCC can</p> <p>22 only pick up WAC, comma, contract price or deal</p> <p>23 price. Therefore, CPCC is picking up the Ery deal</p> <p>24 price for the chargebacks". Did I read that --</p> <p>25 A. Yes.</p>	<p style="text-align: right;">Page 80</p> <p>1 I'll be specific as to time frames.</p> <p>2 Prior to July of 2003 for the</p> <p>3 erythromycin products, how were the WAC prices that</p> <p>4 were published by Abbott to the compendia such as</p> <p>5 First DataBank and Red Book set?</p> <p>6 A. I -- I think I testified to this already</p> <p>7 today. I think that I explained that we evaluate</p> <p>8 competitive circumstances in the marketplace. It's</p> <p>9 no different for WAC pricing than it is for contract</p> <p>10 pricing, because, remember, we always have customers</p> <p>11 that are purchasing at WAC and list price and we want</p> <p>12 to maximize our margins.</p> <p>13 We evaluated the -- we evaluate the</p> <p>14 competitive situation, what kind of market share do</p> <p>15 we have for our products, what has inflation been</p> <p>16 over time.</p> <p>17 In -- in this case, we al- -- we also</p> <p>18 look at the WAC pricing for our competitors. It's</p> <p>19 hard to discern contract pricing for competitors.</p> <p>20 That information is not readily available. But after</p> <p>21 we have done that, we determine if there's an</p> <p>22 opportunity to take a price increase.</p> <p>23 I told you that we took a total of</p> <p>24 five price increases from 1994 to present.</p> <p>25 Q. Did you negotiate with wholesalers</p>
<p style="text-align: right;">Page 79</p> <p>1 Q. -- correctly?</p> <p>2 In -- were you aware back in 2002 or</p> <p>3 earlier that the computer systems could only pick up</p> <p>4 one price?</p> <p>5 A. I may have been. I don't recall.</p> <p>6 Q. Does -- have -- strike that.</p> <p>7 Have you been aware that there was</p> <p>8 ever any situation where WAC prices may have been the</p> <p>9 prices that should have been billed a wholesaler but</p> <p>10 were not?</p> <p>11 A. No.</p> <p>12 Q. Are you aware -- I'm now focussing back on</p> <p>13 topic number 7, and then I'll probably be moving on</p> <p>14 to other topics, Mr. Fiske.</p> <p>15 Are you aware of any efforts to</p> <p>16 monitor the setting of WAC, W-A-C, or wholesale</p> <p>17 acquisition prices?</p> <p>18 A. Am I aware of the activities involved in</p> <p>19 setting the WAC prices?</p> <p>20 Q. Yes, sir.</p> <p>21 A. Yes, I am.</p> <p>22 Q. And how is that done?</p> <p>23 A. Are we talking specifically for the</p> <p>24 erythromycin products?</p> <p>25 Q. Yes, sir. I'll be more specific. In fact,</p>	<p style="text-align: right;">Page 81</p> <p>1 regarding the WAC prices?</p> <p>2 A. We don't negotiate WAC pricing. We set it.</p> <p>3 Q. Did you negotiate deal prices with</p> <p>4 wholesalers?</p> <p>5 A. Not to my knowledge.</p> <p>6 Q. Did you --</p> <p>7 A. It was an offer that we made.</p> <p>8 Q. Did you negotiate any pricing with</p> <p>9 wholesalers?</p> <p>10 MR. BERLIN: Again, time frame in</p> <p>11 Ery?</p> <p>12 MR. ANDERSON: Yeah.</p> <p>13 Q. (BY MR. ANDERSON): For the erythromycin</p> <p>14 products, has Abbott ever negotiated any pricing to</p> <p>15 wholesalers?</p> <p>16 A. I -- yes.</p> <p>17 Q. In what context?</p> <p>18 A. The only negotiation I specifically</p> <p>19 remember regarding contract pricing on the Erys was</p> <p>20 with Cardinal, for access to their Source Program.</p> <p>21 Q. The Source Program being an effective</p> <p>22 retail buying group that Cardinal manages for its</p> <p>23 member pharmacies?</p> <p>24 A. That's correct. The pricing is really for</p> <p>25 the benefit and meant for the "members," I'll call</p>

21 (Pages 78 to 81)

<p style="text-align: right;">Page 82</p> <p>1 them, that are attached to that contract. It's not</p> <p>2 for Cardinal.</p> <p>3 Q. It's -- the con- -- the prices --</p> <p>4 A. It's for the --</p> <p>5 Q. -- were negotiated between the --</p> <p>6 A. -- the pharmacists that access that retail</p> <p>7 buying group pricing.</p> <p>8 Q. Yes, sir. And I'll -- I'm going to</p> <p>9 rephrase it, just so we have a clean record because</p> <p>10 we were talking over one another a little.</p> <p>11 The -- the pricing that would be</p> <p>12 negotiated between Cardinal and Abbott with respect</p> <p>13 to their Source Program would be retail buying group</p> <p>14 pricing that ultimately would be paid by pharmacies,</p> <p>15 correct?</p> <p>16 A. Pharmacies and maybe other providers that</p> <p>17 could access that pricing, yes.</p> <p>18 Q. Other providers that may be members of</p> <p>19 Cardinal's Source Program?</p> <p>20 A. Yes.</p> <p>21 Q. Okay. Other than the retail buying group</p> <p>22 pricing, were there any other prices that were</p> <p>23 negotiated between Cardinal -- I mean, pardon me,</p> <p>24 between wholesalers and Abbott?</p> <p>25 A. Not to my knowledge.</p>	<p style="text-align: right;">Page 84</p> <p>1 Q. Did you read the deposition testimony of</p> <p>2 Russ Lehn?</p> <p>3 A. No, I did not.</p> <p>4 Q. Do you have any understanding as to the</p> <p>5 reasoning behind the discontinuation of base deal</p> <p>6 pricing for the erythromycin products?</p> <p>7 A. Do I have any knowledge as to the reason it</p> <p>8 was discontinued? I --</p> <p>9 Q. Yes, sir.</p> <p>10 A. -- already explained to you it was</p> <p>11 discontinued because our contract pricing was bumping</p> <p>12 up against actually exceeding our base deal pricing.</p> <p>13 Q. And --</p> <p>14 A. So we discontinued it.</p> <p>15 Q. And you'll agree with me, won't you, that</p> <p>16 that dynamic only existed for a few of the</p> <p>17 erythromycin products?</p> <p>18 A. That's true.</p> <p>19 Q. And, yet, the decision was made to</p> <p>20 discontinue the base deal pricing for all of the</p> <p>21 erythromycin products, correct?</p> <p>22 A. Yes.</p> <p>23 Q. Can you provide any reasoning for that</p> <p>24 decision?</p> <p>25 MR. BERLIN: Objection, asked and</p>
<p style="text-align: right;">Page 83</p> <p>1 Q. With respect to topic number 8 concerning</p> <p>2 the reasoning behind the business decision to</p> <p>3 institute, use, and then subsequently discontinue</p> <p>4 base deal pricing for the erythromycins, I believe</p> <p>5 we've already talked about the reason to institute,</p> <p>6 and -- and it's your testimony that Abbott doesn't</p> <p>7 have any corporate knowledge about why they were</p> <p>8 instituted; is that correct?</p> <p>9 MR. BERLIN: Objection, form.</p> <p>10 Objection, scope.</p> <p>11 A. I could find no one who knew why we had</p> <p>12 instituted base deal pricing. It had existed for</p> <p>13 many, many years before I came to Pricing and</p> <p>14 Contracting, based on my discussions with Tip Parker</p> <p>15 at least.</p> <p>16 Q. (BY MR. ANDERSON): From 1994 through 2002,</p> <p>17 did you have any understanding of why base deal</p> <p>18 pricing continued to be utilized for the</p> <p>19 erythromycins in selling drugs to wholesalers?</p> <p>20 A. Because it was always there. I -- I -- I</p> <p>21 never questioned it, to be honest with you.</p> <p>22 And -- and in the course of preparing</p> <p>23 for this, others didn't know why de- -- base deal</p> <p>24 pricing was ever -- ever developed and why it</p> <p>25 existed.</p>	<p style="text-align: right;">Page 85</p> <p>1 answered twice. You can go ahead and answer again</p> <p>2 now.</p> <p>3 A. I -- I've already answered that question a</p> <p>4 couple of times that it didn't make sense to main- --</p> <p>5 I -- I -- I don't even remember all the thought</p> <p>6 processes that went on at the time. It was five</p> <p>7 years ago. We -- five to six years ago.</p> <p>8 The Ery-Tab pricing in particular was</p> <p>9 bumping up against the base deal pricing. There were</p> <p>10 other products where we took significant price</p> <p>11 increases of 20, I think, to 40 percent. It's on</p> <p>12 that other sheet. There were others that we took</p> <p>13 much lower prices on -- price increases on. But the</p> <p>14 fact is, we just decided to eliminate base deal</p> <p>15 pricing at that time.</p> <p>16 Q. (BY MR. ANDERSON): I -- I understand that,</p> <p>17 and I'm -- I'm not trying to be redundant here. I'm</p> <p>18 just trying to make sure --</p> <p>19 A. Well, let me give you --</p> <p>20 Q. -- I've exhausted your knowledge --</p> <p>21 A. -- an example of --</p> <p>22 MR. BERLIN: Hold on. Hold on. Let</p> <p>23 him --</p> <p>24 THE WITNESS: I'm sorry. I'm sorry.</p> <p>25 MR. BERLIN: Let him finish his --</p>

22 (Pages 82 to 85)

Page 86

1 THE WITNESS: I'm interrupting him --
 2 yeah.
 3 Q. (BY MR. ANDERSON): And -- and -- and if
 4 you've told me everything that Abbott knows about
 5 that decision, then I understand. But other than the
 6 fact that there was a decision made to discontinue
 7 base deal pricing altogether, other than that simple
 8 fact, do you have any information as to why base deal
 9 pricing was eliminated for the erythromycin products
 10 that were not experiencing market price increases
 11 that exceeded the existing base deal price?

12 MR. BERLIN: Objection. That was also
 13 asked and answered right after the break. Go ahead,
 14 though.

15 A. We just made a decision to eliminate it
 16 entirely for all products when it was decided that it
 17 didn't make sense to maintain it for Ery-Tab.

18 Q. (BY MR. ANDERSON): Looking at Exhibit -- I
 19 mean, pardon me, topic number 10, Mr. Fiske, which
 20 reads, "The use, if any, of WAC pricing in the sales
 21 and billing of the named Drugs by Abbott to
 22 wholesalers," do you see that?

23 A. Yes.

24 Q. What did you do to prepare to testify about
 25 that topic?

Page 87

1 A. Well, I -- I discussed it with the peo- --
 2 I talked with Beth Garvin who was actually part of
 3 the group that -- what is her -- I apologize.

4 I didn't have to actually talk with
 5 anybody. I -- I mean, I -- I knew what the situation
 6 was. We -- if people qualified for base deal pricing
 7 prior to mid-year 2003, we invoiced them at base deal
 8 pricing. If they didn't, they would have been
 9 invoiced at WAC pricing. Subsequent to July of 2003
 10 when base deal pricing no longer existed, wholesalers
 11 were invoiced at WAC price.

12 Q. Prior to July of 2003, have you seen
 13 anything today that causes you to question whether or
 14 not WAC prices were actually even capable of being
 15 billed wholesalers?

16 A. There was never a question about whether
 17 the wholesalers were billed the WAC pricing. The
 18 question of -- the question that came up in that
 19 document, sir, related to was the chargeback being
 20 processed appropriately.

21 Q. So the -- the bill may have actually been
 22 at WAC, but the chargeback may have been processed
 23 using the base deal price?

24 A. Yes. And then the wholesaler would have
 25 complained and we would have made a correction if

Page 88

1 appropriate.

2 Q. Because the chargeback would have been
 3 insufficient, correct?

4 A. The base deal pricing was less than the WAC
 5 price, so the whole- -- the wholesaler would have
 6 received the difference between the base deal pricing
 7 and the contract price rather than the higher
 8 difference that perhaps they should have been
 9 entitled to if they purchased, in fact, at WAC.

10 Q. Right. And that's why a wholesaler would
 11 complain, because they would be expecting a much
 12 greater chargeback all the way up to the level of the
 13 WAC invoice price, as opposed to a chargeback that
 14 only was processed from the lower base deal price,
 15 correct?

16 A. Yes.

17 Q. Looking at topic number 11, Mr. Fiske, what
 18 information do you have to support the assertion that
 19 all actions taken by Abbott with respect to any of
 20 the matters alleged in this complaint were taken in
 21 good faith?

22 A. (Reviews document.) Everything that we do
 23 in terms of our business, I think, is done in good
 24 faith. And based and my discussions with people when
 25 we actually went through these questions, I don't

Page 89

1 know that they focused on the good faith part of this
 2 so much as they focused on the industry practice.
 3 But I think that I can state for the record that
 4 everybody at Abbott is doing things in good faith to
 5 comply with laws, etcetera.

6 Q. You mentioned that people were more focused
 7 on the industry practice. What industry practices
 8 did you gain information about in preparing to
 9 testify?

10 A. There were numerous questions regarding
 11 industry practices. There were industry practice
 12 questions related to the setting of WAC, list price,
 13 etcetera.

14 Q. Uh-huh.

15 A. We know very little about industry
 16 practices regarding setting of WAC and list price.
 17 We only know our own practices for setting those, and
 18 those of companies that we've acquired, such as Knoll
 19 and Kos, which their practices don't -- didn't appear
 20 to be much different than ours. They would do
 21 similar evaluations in terms of competitive
 22 circumstances, inflation rates, etcetera.

23 I can't speak for other companies.

24 It's illegal for us to talk with them, and we don't.

25 There were questions about data reporting to the data

23 (Pages 86 to 89)

Page 90

1 agencies. I don't have firsthand knowledge about
2 what they reported to the data agencies, but people
3 at Abbott, in the course of conversations with other
4 individuals, have learned what other manufacturers
5 do.

6 For example, Mark Turon, in the course
7 of his responsibilities, had an occasion, at least
8 once, if not more frequently, to have a conversation
9 with First DataBank -- a former Abbott employee,
10 actually, Kay Morgan, who worked at First DataBank.

11 And this was when Abbott still
12 actually reported an estimated AWP to the data
13 agency. And it was a discussion about the -- I don't
14 know the full discussion, but Kay related to Mark
15 that there were other manufacturers that were
16 reporting AWP's similar to the 125-percent estimated
17 AWP that we provided, and others were reporting much
18 higher AWP's, 133 percent, and generic manufacturers
19 sometimes even multiples of a WAC number.

20 But that's the only knowledge we have;
21 not firsthand knowledge so much as what somebody at a
22 data agency told somebody at Abbott.

23 Q. All right. We'll get into the specific
24 data agency questions in a moment.

25 With respect to industry practices in

Page 91

1 invoicing wholesalers at deal prices, does Abbott
2 have any information that other drug companies
3 invoiced wholesalers at prices other than the
4 published WAC prices?

5 A. I don't have such information, but I'm
6 assuming if they sold to them at a contract price,
7 they were invoiced at the contract price. That's
8 purely speculative and common sense.

9 Q. Do you -- do you have any -- does Abbott
10 have any information that the way it billed
11 wholesalers for the erythromycin products prior to
12 July of 2003 was in conformity with any industry
13 practice?

14 MR. BERLIN: I'm sorry. Can I have
15 that either restated or read back -- maybe read
16 back?

17 (Requested testimony read back.)

18 MR. BERLIN: Objection, form.

19 A. Our base deal price was a contract price
20 that was offered to purchasers. I'm sure other
21 manufacturers have contract pricing that they offer
22 to purchasers.

23 When you offer contract purchas- --
24 price to a purchaser and they buy product under that
25 contract, then they get the contract pricing and

Page 92

1 that's what they're invoiced at.

2 So to the extent that it's common
3 sense, it probably was industry practice. I'm sure
4 that other manufacturers weren't billing or invoicing
5 their customers for more than a -- a contract price
6 that was called for.

7 MR. ANDERSON: Objection,
8 nonresponsive.

9 Q. (BY MR. ANDERSON): I -- you broadened your
10 answer, Mr. Fiske, to purchasers and contract
11 prices. I'm asking a very specific question about
12 billings to wholesalers. And I'm going to rephrase
13 it, but it's -- it's a very specific question.

14 Does Abbott have any information that
15 the way it billed wholesalers for the erythromycin
16 drugs prior to July of 2003 was in conformity with
17 any industry practice?

18 A. I answered your question. I told you it
19 was a contract price. I'm sure other manufacturers
20 have contract pricing. That's industry practice.

21 I'm sure that all manufacturers
22 invoice at a contract price when they sell it to a
23 contract customer. The contract customer in this
24 case for our erythromycins was the wholesaler. We
25 invoiced them at the contract price. That's industry

Page 93

1 practice.

2 Q. Do you have any information that other drug
3 companies typically invoiced wholesalers at contract
4 prices from 1994 through July of 2003?

5 A. I will say this: I am aware that other
6 manufacturers offer deals, and I'm sure that when
7 they offer a deal, they're billing at the deal
8 price.

9 Q. To wholesalers?

10 A. If the deal is to the wholesaler, yes.

11 Q. Do you have any information, as Abbott's
12 corporate representative, that other drug companies
13 were offering deals, deal prices, contract prices,
14 any prices that were lower than WAC to wholesalers as
15 the invoice price from 1994 through 2003?

16 A. I don't have evidence. I have knowledge
17 from my conversations with some of my peers at Abbott
18 there are companies that offer year-end deals and the
19 opportunity to buy at a price that is lower than the
20 current WAC.

21 I know that from a conversation
22 with -- what's the guy's name? I can't think of
23 the individual's name, excuse me. He's -- he's in
24 our -- he worked -- he used to work for another
25 manufacturer and told me about year-end deals that

24 (Pages 90 to 93)

Page 94

1 they did. So I know that these year-end deals occur
2 and that pricing is offered to wholesalers.

3 Q. The -- the base deal pricing that Abbott
4 offered was not on a year-end basis, though; it was
5 on a continual basis, correct?

6 A. In the case of the erythromycins, that's
7 true.

8 Q. Okay.

9 A. We had other products that we offered
10 deals on that were periodic deals. That's just the
11 way we --

12 Q. Well --

13 A. -- happened to select to do business on
14 this particular product line.

15 Q. Limiting to the erythromycins, what
16 information, if any, does Abbott have that the way it
17 billed wholesalers from 1994 through June of 2003 was
18 in conformity with industry practice through the use
19 of contract prices or deal prices in billing
20 wholesalers?

21 MR. BERLIN: Objection, form.
22 Objection scope.

23 A. I don't -- I don't know that you're asking
24 me a different question than I've already answered a
25 multiple of times. I -- I don't know mean to be rude

Page 95

1 or anything, but I've already told you that it was a
2 contract price.

3 Are you asking me whether I know what
4 our competitive -- competitors in the erythromycin
5 market were doing? I don't know what they were
6 doing.

7 Q. Okay. That -- I am asking about
8 specifics. I'm -- I'm definitely asking about
9 specifics, sir, and I appreciate your testimony to
10 that. But it's -- I'm not just asking about the
11 erythromycins, per se.

12 I'm asking: Do you have any
13 information as, Abbott's corporate representative,
14 that any other drug company was billing for any of
15 their drugs to wholesalers at contract prices or deal
16 prices or any other prices lower than the published
17 WAC for those drugs, such as Abbott was doing for the
18 erythromycins from 1994 through June of 2003?

19 MR. BERLIN: Objection, form.

20 A. The deal periods may have been different,
21 but I already told you -- and I wish I could remember
22 the name of the individual. He's in a group that we
23 call GPO. It's mature pro- -- MPO, I'm sorry, Mature
24 Products Organization, and he used to work for
25 another pharmaceutical manufacturer and they did

Page 96

1 periodically offer deals.

2 Some of those were quarter-end deals
3 or other time periods, and I'm sure that when those
4 deals were offered, they were invoiced at the deal
5 price.

6 Q. (BY MR. ANDERSON): When did you
7 approximately have this conversation with this
8 gentleman?

9 A. Within the last three months.

10 Q. So would it be fair to say that prior to
11 the last three months, you didn't have that
12 information, correct?

13 A. I've known that deals were offered by
14 various manufacturers going all the way back to 1991
15 when I was a financial analyst supporting the
16 national accounts group.

17 We were doing vitamin deals, we were
18 doing other deals, and I was aware that we were doing
19 them in response to deals that were being offered by
20 other manufacturers.

21 Q. "We" being Abbott?

22 A. Correct.

23 Q. And you understood Abbott was offering
24 deals on vitamins in response to competitive deals
25 offered by other drug companies?

Page 97

1 A. We were doing deals similar to what other
2 companies were offering, not necessarily on vitamins,
3 but it --

4 Q. Okay.

5 A. -- it was a -- it's a standard practice in
6 the industry -- or it was probably more of a practice
7 back then, but a number of manufacturers offered
8 deals to achieve sales ob- -- short-term sales
9 objectives, quite frankly.

10 Q. I -- I understand that, and I'm aware of
11 some short-term deals.

12 Now shifting gears, sir, to the
13 existence of the base deal pricing offer that was in
14 place from Abbott from at least 1994 through June of
15 2003, was Abbott offering that in response to any
16 competitive offer from any other drug company?

17 A. I told you earlier, I don't know why the
18 base deal pricing was implemented, and it just
19 continued because it just continued.

20 Q. How is it, then, sir, that that process of
21 invoicing prices to wholesaler at amounts lower than
22 published WAC is in conformity with industry
23 practice?

24 MR. BERLIN: Objection, form.

25 A. I explained to you previously, base deal

25 (Pages 94 to 97)

<p style="text-align: right;">Page 98</p> <p>1 pricing is an offer of a contract price. If you meet 2 the requirements, then you will -- 3 MR. BERLIN: Just wait a second. I -- 4 I -- I don't know how long that's going to go on. I 5 don't -- 6 MR. ANDERSON: Well, we'll have to 7 stop it if it goes on too much more because it 8 interrupted him in mid-answer. 9 MR. BERLIN: While we're stopping for 10 a second -- and I'm sorry, we're -- this is all in 11 the middle of your answer, but hopefully that was one 12 isolated noise. 13 Just on scheduling issue -- 14 MR. ANDERSON: Uh-huh. 15 MR. BERLIN: -- assuming that 16 everything goes smoothly and we're not interrupted by 17 noises, you know, I just wanted to apprise you of -- 18 of Mr. Fiske's request that we break on the earlier 19 side for lunch. So -- 20 MR. ANDERSON: That's -- 21 MR. BERLIN: -- not -- I don't know 22 mean early like now, I mean that we don't end up 23 doing it at, like, 1:00 and that we break at, like, 24 sometime between noon and 12:20. So -- 25 MR. ANDERSON: Let's -- let's -- let's</p>	<p style="text-align: right;">Page 100</p> <p>1 Q. (BY MR. ANDERSON): I -- I appreciate that, 2 and I'm going to put a fine point on this. 3 Does Abbott have any information that 4 any other drug companies had a program in place that 5 li- -- lasted for years and years at which 6 wholesalers could be invoiced at contract prices? 7 MR. BERLIN: Hold -- hold on. 8 Objection, form. Objection, scope. 9 A. I never evaluated that, and the people that 10 I talked with never brought that issue up. 11 Q. (BY MR. ANDERSON): So with respect to that 12 particular activity, there's no evidence that that 13 was in conformity with industry practice? 14 MR. BERLIN: Objection, form. 15 A. I think you're misrepresenting what I said, 16 and I won't agree with that. 17 Q. (BY MR. ANDERSON): Specific to 18 transactions between drug companies and wholesalers, 19 are you aware of any drug company other than Abbott 20 PPD -- I'm going to rephrase. 21 Sir, what -- specific to transactions 22 between drug companies and wholesalers, are you aware 23 of any drug company other than Abbott PPD selling its 24 drugs at contract prices or deal prices to 25 wholesalers for extended periods of time, such as</p>
<p style="text-align: right;">Page 99</p> <p>1 do this. I'm going to rephrase -- I'm going to -- 2 I'm going to have my question read back. We can get 3 to the end of this line of questions, and we can 4 break for lunch and then hopefully you can talk to 5 the contractors and see if they can take it easy this 6 afternoon. 7 MR. BERLIN: Well, I don't know that I 8 have any -- you're -- you're way overestimating my 9 power within the firm. 10 The -- the -- and I'm not suggesting 11 we need to break now. I just didn't want to have a 12 situation where we went long and then we came back 13 and we went for ten minutes and told you that we 14 needed a break. I just -- 15 MR. ANDERSON: That's fine. 16 MR. BERLIN: -- wanted to -- 17 MR. ANDERSON: Yeah. 18 MR. BERLIN: -- apprise you. Okay. 19 (Requested testimony read back.) 20 A. And -- and I'll repeat what I've said 21 several times over. Our base deal price was, in 22 effect, a contract price. It's industry practice to 23 invoice purchasers who are buying at a contract price 24 at that contract price. The wholesalers were 25 purchasing at a contract price from us.</p>	<p style="text-align: right;">Page 101</p> <p>1 year after year after year, and those contract prices 2 being invoiced those wholesalers? 3 A. I'm not aware of that, but I'm not aware 4 that there weren't. 5 MR. ANDERSON: Okay. We can take a 6 break now for lunch and -- 7 MR. BERLIN: I just -- before we go 8 off the record, I'm not at all suggesting we need to 9 break now for lunch. I mean, we're -- I -- we're 10 happy to continue or we're happy to take a quick 11 break and come back and go for another 45 minutes. 12 I -- I -- I just wanted to let you know -- 13 MR. ANDERSON: Sure. 14 MR. BERLIN: -- so that we didn't, you 15 know, break and -- you know what I'm saying? I 16 didn't want you breaking 20 minutes from now and then 17 come back and have to tell you that. So... 18 MR. ANDERSON: That's fine. 19 THE VIDEOGRAPHER: We are off the 20 record at 11:30 a.m. This is the end of tape 2. 21 (Lunch recess taken.) 22 THE VIDEOGRAPHER: We are on the 23 record. It is, sorry, 12:36 p.m. This is the 24 beginning of tape 3. 25 Q. (BY MR. ANDERSON): All right. Mr. Fiske,</p>

26 (Pages 98 to 101)

<p style="text-align: right;">Page 102</p> <p>1 welcome back.</p> <p>2 A. Thank you.</p> <p>3 Q. We were focused on topic number 11, and I</p> <p>4 was asking you some questions about the underlying</p> <p>5 basis for Abbott's awareness of industry practice.</p> <p>6 Do you have any understanding, as the</p> <p>7 Abbott corporate representative, of the price</p> <p>8 reporting practices of other drug companies?</p> <p>9 A. Only to the extent that I explained to you</p> <p>10 previously -- it's our understanding that most</p> <p>11 manufacturers report WAC and list price, but I did</p> <p>12 tell you that when Mark Turon had a conversation with</p> <p>13 Kay Morgan at First DataBank, that she also talked</p> <p>14 with him about some manufacturers' practices with</p> <p>15 respect to reporting AWP.</p> <p>16 Q. And what did she express to him again?</p> <p>17 A. She -- she made note of the fact that the</p> <p>18 estimated AWP that Abbott had provided was 125</p> <p>19 percent of WAC, she made a comment that some other</p> <p>20 manufacturers were reporting AWP's as high as 133</p> <p>21 percent of WAC, and in the case of some generic</p> <p>22 companies, they were even multiples of WAC.</p> <p>23 She also went on to say that the data</p> <p>24 agencies -- that it didn't really matter what</p> <p>25 manufacturers were reporting because the data</p>	<p style="text-align: right;">Page 104</p> <p>1 inflation estimates or monitoring pricing actions by</p> <p>2 competitors.</p> <p>3 Q. What was the name of that second company?</p> <p>4 A. Kos Pharmaceuticals, K-o-s.</p> <p>5 Q. It -- does Abbott have different procedures</p> <p>6 for setting the published WAC prices of brand drugs</p> <p>7 that are marketed and sold as brands as compared to</p> <p>8 the erythromycins?</p> <p>9 MR. BERLIN: Objection, scope.</p> <p>10 A. No.</p> <p>11 Q. (BY MR. ANDERSON): Do you have any</p> <p>12 understanding of other drug companies having</p> <p>13 different practices for setting WAC prices that they</p> <p>14 published to the pricing services for brand drugs as</p> <p>15 compared to generic drugs?</p> <p>16 A. I don't know.</p> <p>17 Q. Do you have any understanding as to why</p> <p>18 some generic drugs or generic drug companies cause</p> <p>19 AWP's to be published that are multiples of WAC as</p> <p>20 opposed to just 25 percent higher than WAC?</p> <p>21 A. I don't know that they cause them to be</p> <p>22 published. I am saying that that is what Kay Morgan</p> <p>23 represented that some companies were reporting to the</p> <p>24 data agencies. I don't know that you can say that</p> <p>25 one leads to the other necessarily.</p>
<p style="text-align: right;">Page 103</p> <p>1 agencies did surveys of wholesalers to confirm what</p> <p>2 the AWP really should be.</p> <p>3 Q. When did Ms. Morgan and Mr. Turon have this</p> <p>4 conversation?</p> <p>5 A. I don't know precisely when. He -- so he</p> <p>6 was Manager of Pricing Operations, I believe it was,</p> <p>7 from 1991 till about 2000, and it -- it was sometime</p> <p>8 during the course of that time frame.</p> <p>9 Q. Why did Mr. Turon ask Ms. Morgan about the</p> <p>10 practices of other drug companies?</p> <p>11 A. He didn't ask. She volunteered it.</p> <p>12 Q. Oh. Did you have any understanding --</p> <p>13 strike that.</p> <p>14 Do you, as Abbott's corporate</p> <p>15 representative, have any understanding of how other</p> <p>16 drug manufacturers set the prices such as WAC prices</p> <p>17 that they, in turn, publish or report to pricing</p> <p>18 services like First DataBank?</p> <p>19 A. Only to the extent that we acquired a</p> <p>20 company by the name of Knoll, or "Knoll," some people</p> <p>21 say, Pharmaceutical. We also acquired a company by</p> <p>22 the name of Kos Pharmaceuticals, and their practices</p> <p>23 were not much different than our own in terms of --</p> <p>24 in terms of setting WAC.</p> <p>25 It was done based on surveys or</p>	<p style="text-align: right;">Page 105</p> <p>1 Q. Okay. Well, do you have an understanding</p> <p>2 of why some --</p> <p>3 A. Especially given her feedback that, in</p> <p>4 fact, the data agencies do surveys of wholesalers to</p> <p>5 verify what an appropriate AWP should be.</p> <p>6 Q. Do you have any understanding of how those</p> <p>7 surveys are conducted?</p> <p>8 A. I don't.</p> <p>9 Q. Do you have any un- --</p> <p>10 A. You'd have to ask her.</p> <p>11 Q. Do you have any understanding of how the</p> <p>12 wholesalers obtain information about the AWP's?</p> <p>13 A. Well, they sell their product --</p> <p>14 MR. BERLIN: I'm sorry. I -- I -- I</p> <p>15 was slow to object, so I --</p> <p>16 THE WITNESS: Sure.</p> <p>17 MR. BERLIN: -- apologize. Objection</p> <p>18 to form.</p> <p>19 A. It's purely speculative. They sell the</p> <p>20 product to the ultimate customer. Who would be in a</p> <p>21 better position to estimate what their average</p> <p>22 selling price is than them?</p> <p>23 Q. (BY MR. ANDERSON): Is the AWP for a given</p> <p>24 drug the selling price from the wholesaler to the</p> <p>25 pharmacy?</p>

27 (Pages 102 to 105)

Page 106

1 MR. BERLIN: Objection, form.
 2 Objection -- well, I'll leave it at that.
 3 A. I actually don't know what it is. I can
 4 tell you that there was a book that I read many years
 5 ago written by somebody by the name of Mick Kolassa,
 6 and he defined AWP, I believe, as to be the average
 7 selling price from the wholesaler to their
 8 customers. But I think it's an antiquated term
 9 today, because that was -- that was their selling
 10 price when maybe most of them were selling at a 20-
 11 to 25-percent markup.

12 Again, this is all from his book.
 13 It's not me knowing all this, other than from what I
 14 had read. I read the book many times after I
 15 obtained it back in the '90s. So other than that, I
 16 don't know.

17 Q. (BY MR. ANDERSON): Other than Mick
 18 Kolassa's book and the explanation of AWP that you
 19 just explained, do you have any other information
 20 about the meaning of AWP?

21 A. No.

22 MR. BERLIN: Wait. Can I just --
 23 which topic is that under?

24 MR. ANDERSON: Well, we were talking
 25 about industry practices and the practices of drug

Page 107

1 companies. It's -- it falls under 11 to some extent,
 2 although 11 is very broad because of the statement in
 3 the answer, but it also falls under number 2 and
 4 number 3 specifically.

5 MR. BERLIN: All right. Well, I mean,
 6 I'm going to object to the scope of the question. He
 7 gave his answer, which is fine. That's his --

8 MR. ANDERSON: Okay.

9 MR. BERLIN: -- his personal answer.
 10 I did think -- I guess I -- the last few questions I
 11 thought were -- not that one, I don't know that's
 12 under anything, but the other was under 3, and I know
 13 you may have more on 11 and I think he has more on
 14 11. But I just wanted to clarify that one particular
 15 question.

16 MR. ANDERSON: Okay.

17 Q. (BY MR. ANDERSON): Let's go to topics
 18 number 2 and number 3 specifically, Mr. Fiske, since
 19 we're talking about drug pricing.

20 You've -- you've reviewed those topics
 21 before today, correct?

22 A. Yes.

23 Q. And you're prepared to testify about those
 24 topics on behalf of Abbott, correct?

25 A. I'm prepared to testify based on the

Page 108

1 discussions I had with the individuals I talked with
 2 you about earlier.

3 Q. And your own experience and --

4 A. And my own personal experience.

5 Q. Yes, sir. In preparing to testify, did you
 6 gain any information that Abbott understands how
 7 other drug companies set their AWP's?

8 A. No.

9 Q. Did you gain any understanding of how any
 10 other drug companies set any, quote, list prices?

11 A. No.

12 Q. Without understanding how other drug
 13 companies are setting prices that they publish such
 14 as AWP's, how can Abbott know whether or not it's in
 15 conformity with industry practice?

16 MR. BERLIN: Objection, form.
 17 Objection, scope.

18 A. The information that we report to the data
 19 reporting agencies, the WAC and the list price --
 20 hang on for a second.

21 We -- we know that the companies that
 22 we acquired, that it was either the WAC or the list
 23 pricing. Not both of the companies that we acquired
 24 actually had both metrics. It was what they were
 25 reporting to the data agencies.

Page 109

1 So I -- I can only base it on the
 2 companies that I know firsthand knowledge of. I
 3 don't have firsthand knowledge of competitors of ours
 4 and exactly what they're reporting.

5 Q. (BY MR. ANDERSON): The -- when did the
 6 Knoll acquisition occur?

7 A. 2001.

8 Q. When did the Kos ac- -- acquisition occur?

9 A. 2006.

10 Q. What, if any, information did Abbott
 11 understand with respect to the industry practices of
 12 other drug companies in publishing AWP prices prior
 13 to 2001?

14 A. Could you ask your question again? I'm --

15 Q. Sure.

16 A. -- sorry for not listening carefully.

17 Q. What information, if any, did Abbott hold
 18 or understand prior to 2001 with respect to how other
 19 drug companies published AWP's?

20 A. I don't know exactly when Mark Turon's
 21 conversation occurred with Kay Morgan. I think
 22 that's the only thing that I learned in my
 23 investigation of talking with people. Most people
 24 were not familiar with the way other companies set --
 25 this is not the question you asked, but set WACs or

28 (Pages 106 to 109)

<p style="text-align: right;">Page 110</p> <p>1 list prices.</p> <p>2 In fact, they're not even familiar</p> <p>3 with the way we set them at Abbott. They're not</p> <p>4 involved in the setting of those prices. So most of</p> <p>5 the people that I talked with had no knowledge about</p> <p>6 how anybody in the industry sets any of these prices.</p> <p>7 They are aware that First DataBank</p> <p>8 publishes a WAC, a list price, and an AWP. They</p> <p>9 don't always publish a list price for all companies.</p> <p>10 That's pretty much the extent of most</p> <p>11 of those people's knowledge.</p> <p>12 Q. Has Mark Turon ever had responsibility for</p> <p>13 setting any Abbott prices?</p> <p>14 A. No. He actually didn't set the prices.</p> <p>15 Pricing was communicated to him. He was responsible</p> <p>16 for making sure that the those prices were loaded</p> <p>17 into the systems and for reporting price changes --</p> <p>18 changes to our WAC and our list price, that is -- to</p> <p>19 the data vendors, as well as to wholesalers and --</p> <p>20 and selected customers.</p> <p>21 Q. Would it be fair to say that Mark Turon was</p> <p>22 basically the person in charge of taking the prices</p> <p>23 that had been set by others within Abbott and, in</p> <p>24 turn, disseminating that out to the price compendia,</p> <p>25 or the wholesalers, for instance?</p>	<p style="text-align: right;">Page 112</p> <p>1 responsibility when she was at First DataBank to</p> <p>2 instruct Abbott on how to report its prices?</p> <p>3 A. If we were doing something incorrectly.</p> <p>4 Q. Who ultimately controls the prices that</p> <p>5 were reported by Abbott to compendias such as First</p> <p>6 DataBank?</p> <p>7 MR. BERLIN: Objection, form.</p> <p>8 A. I don't know the answer to that question</p> <p>9 actually. We always reported what we always</p> <p>10 reported, which was our WAC and our list price. Our</p> <p>11 WAC being our non-discounted price to the</p> <p>12 wholesaler. List being that, our published list</p> <p>13 price in the catalogs that we issued.</p> <p>14 Q. (BY MR. ANDERSON): What -- strike that.</p> <p>15 With respect to that specific practice</p> <p>16 of reporting a WAC price that was a list price, what</p> <p>17 steps, if any, did Abbott undertake to understand if</p> <p>18 that was within industry practice?</p> <p>19 A. Our WAC price wasn't our list price. It</p> <p>20 was 95 percent of our list price. Our WAC price was</p> <p>21 our -- our price to the wholesaler. It was also our</p> <p>22 full case quantity discount price to anybody that</p> <p>23 purchased directly from Abbott.</p> <p>24 You asked me something beyond that,</p> <p>25 and I apologize. I just wanted to --</p>
<p style="text-align: right;">Page 111</p> <p>1 A. I think that's a fair way to present it.</p> <p>2 Q. But he didn't have any responsibility for</p> <p>3 setting any of the prices?</p> <p>4 A. No.</p> <p>5 Q. How, if at all, did the information Mark</p> <p>6 Turon gained in this conversation with Kay Morgan</p> <p>7 that you learned of recently impact the way Abbott</p> <p>8 set any price on erythromycins?</p> <p>9 A. It didn't impact it at all. I might add a</p> <p>10 comment. You know, Kay Morgan used to work at Abbott</p> <p>11 Laboratories. I don't know exact- -- exact- --</p> <p>12 exactly how close she was to some of the decisions</p> <p>13 regarding erythromycin contracting, or not the</p> <p>14 decision so much as knowing we had a base deal price</p> <p>15 and so forth. But, you know, she never told us that</p> <p>16 we should be reporting anything differently than the</p> <p>17 WAC and the list price that we were reporting to</p> <p>18 them.</p> <p>19 She actually had responsibility at one</p> <p>20 point in time for reporting those prices to the data</p> <p>21 agencies herself. It would have been a perfect</p> <p>22 opportunity to inform us if we were doing it</p> <p>23 incorrectly, and she never took advantage of that to</p> <p>24 tell us.</p> <p>25 Q. Do you feel like it was Kay's job</p>	<p style="text-align: right;">Page 113</p> <p>1 Q. Yeah, and I --</p> <p>2 A. -- make sure there wasn't a</p> <p>3 misunderstanding that list was our WAC, if not.</p> <p>4 Q. Okay. Let -- I'll -- I'll find your prior</p> <p>5 testimony, and I'll -- I didn't try to misstate it on</p> <p>6 purpose.</p> <p>7 THE REPORTER: His last answer?</p> <p>8 MR. ANDERSON: No, keep going.</p> <p>9 THE REPORTER: That one (indicating)?</p> <p>10 MR. ANDERSON: Yeah, that's it.</p> <p>11 That's it.</p> <p>12 Q. (BY MR. ANDERSON): Okay. I'll rephrase my</p> <p>13 question now that I've seen your prior testimony.</p> <p>14 What steps, if any, did Abbott</p> <p>15 undertake to understand whether its policy of</p> <p>16 reporting a WAC price as a non-discounted price to</p> <p>17 the pricing services comported with industry</p> <p>18 standard?</p> <p>19 A. If you read Mick Kolassa's book that's what</p> <p>20 he defines WAC as. Wholesale acquisition cost is the</p> <p>21 non-discounted price that a manufacturer has for the</p> <p>22 product for the wholesaler.</p> <p>23 Q. Did Abbott set its WAC prices based on Mick</p> <p>24 Kolassa's book?</p> <p>25 A. WAC prices, when a product is launched into</p>

29 (Pages 110 to 113)

<p style="text-align: right;">Page 114</p> <p>1 the marketplace, are based on studies, etcetera. WAC 2 price is our price to wholesaler. It's the 3 non-discounted price. That's what we always reported 4 it to the pricing compendia. Similarly, our list 5 price is what we always reported to the pricing 6 compendia. 7 Q. Has -- has Abbott ever become aware that 8 other drug manufacturers report to the compendia WAC 9 prices that are known as wholesale invoice prices? 10 MR. BERLIN: Objection, form. 11 A. I don't know for sure whether I'm aware of 12 that or not. 13 Q. (BY MR. ANDERSON): Have you ever -- 14 A. I don't recall. 15 Q. Have you ever known that WAC price is known 16 as wholesale invoice price? 17 A. Well, our WAC prices are wholesale invoice 18 price if the wholesaler pays WAC for the product. 19 Q. And, likewise, it's not your wholesale 20 invoice price when the wholesaler pays deal price, 21 correct? 22 A. No, but we still have a WAC price out there 23 that some wholesalers are paying for the product, as 24 well as other customers. 25 Q. Right. Do you have any understanding of</p>	<p style="text-align: right;">Page 116</p> <p>1 Kos didn't have a list price. They 2 didn't sell directly to customers. 3 Q. So -- you're referencing Kos and -- and 4 Knoll in -- 5 A. They're the -- 6 Q. -- that answer? 7 A. -- two companies I actually have personal 8 knowledge of. 9 Q. I see. Okay. But beyond Kos and Knoll, 10 does Abbott have any knowledge that other drug 11 manufacturers were choosing to not report certain 12 wholesale invoice prices and, rather, report other 13 higher wholesale invoice prices as WAC? 14 A. I don't know if other manufacturers were 15 reporting a lower contract price. I would imagine 16 that they would not because it's confidential 17 information, and you ensure that with a data agency 18 for publication to anybody out there that wanted to 19 see the number. 20 Q. What was confidential about Abbott's deal 21 price? 22 A. It was meant for the benefit of our 23 customers. 24 Q. And every single wholesaler was made aware 25 of that, weren't they?</p>
<p style="text-align: right;">Page 115</p> <p>1 how other drug manufacturers report or choose to 2 report specific wholesale prices for a given drug at 3 a given time? 4 A. No. 5 Q. So, for instance, other drug companies may 6 choose to report as their WAC their actual wholesale 7 invoice prices -- 8 MR. BERLIN: Objection, form. 9 Q. (BY MR. ANDERSON): -- correct? 10 A. I have no knowledge what other 11 manufacturers report to the data agency. 12 Q. How does Abbott know that its selection of 13 its published WAC price as opposed to its deal prices 14 comports with industry standard? I'll rephrase. I 15 can see a confused look on your face. 16 How does Abbott know that it's choice 17 to publish its WAC price to the compendia as opposed 18 to its deal prices to the compendia comports with 19 industry standard? 20 A. I already told you that the companies that 21 we acquired had contract pricing out there available 22 to customers. They didn't report the contract 23 pricing to the compendia. They reported their WAC 24 and their list price to the compendia if they had a 25 list price. They always reported WAC.</p>	<p style="text-align: right;">Page 117</p> <p>1 A. In order for customers to take advantage of 2 a -- an offer that you're making, you have to make 3 them aware of it, yes. 4 Q. So what was confidential about the deal 5 price, given that every wholesaler was made aware of 6 that exact deal price? 7 A. It wasn't out there for our competitors to 8 see. 9 Q. Do you know how Abbott's published WAC 10 prices on the erythromycins compared to competitors' 11 published WAC prices? 12 A. Not right off the top of my head, no. 13 Q. Have you made any effort to understand that 14 as the Abbott corporate representative -- 15 A. I -- 16 MR. BERLIN: Wait. I'm sorry. The -- 17 that -- I -- I -- 18 Q. (BY MR. ANDERSON): -- understand how 19 Abbott's published WAC prices compared to competitive 20 drug companies' WAC prices on the erythromycins? 21 MR. BERLIN: Objection, form. 22 A. Okay. I think maybe a better way to have 23 answered the other question is I -- I tal- -- talked 24 to you about the evaluation we do at the time that 25 we're evaluating whether to change contract pricing,</p>

30 (Pages 114 to 117)

<p style="text-align: right;">Page 118</p> <p>1 and, you know, we look at the WAC pricing that's out 2 there for First DataBank and it's largely not 3 relevant. 4 Now, I don't know what the competitors 5 sell to wholesalers for, but I -- I do know from the 6 feedback that we get from our national trade 7 executives that the pricing that we need to be 8 offering to the retailer is significantly different 9 than that WAC pricing. 10 So -- I don't know whether I've really 11 answered your question or not, but I -- I -- I just 12 want you to realize that the WAC pricing for some of 13 those generic companies -- there may be a small 14 percentage of their sales at that WAC pricing. 15 But I don't know. All I know is that 16 there is a WAC price that they report to the data 17 agency. 18 Q. (BY MR. ANDERSON): I don't want to belabor 19 your prior testimony, but I'm going to ask a couple 20 of questions by way of background. 21 Do you recall testifying previously 22 that WAC is known as the wholesale invoice price? 23 A. I may have said that. It is the wholesale 24 invoice price for those that are paying WAC for the 25 product.</p>	<p style="text-align: right;">Page 120</p> <p>1 compendia, how was the estimated AWP represented? 2 A. How was it represented? 3 Q. Was it -- 4 A. What you mean by that? 5 Q. Was it literally titled "estimated AWP"? 6 A. It was for a period of time. Before that, 7 it was actually labeled "AWP". It was felt that it 8 would be more correct to say it was an estimated 9 AWP. So at the -- at the last couple of years, it 10 was reported as an estimated AWP. It always was an 11 estimated AWP. 12 Q. What was Abbott's understanding, if any, of 13 the industry practice of other drug companies in 14 reporting prices to the compendia that were labeled 15 "AWP"? 16 MR. BERLIN: Objection, form. 17 A. All I can relate to you is what Mark Turon 18 learned when he had the conversation with Kay 19 Morgan -- and it's being repetitive, but that was 20 that some manufacturers were reporting AWP's -- I 21 think he actually told me that -- that they ranged 22 from 118, 120, 125 percent of WAC and Kay Morgan 23 specifically related that some of them were as high 24 as 133 percent of WAC and some generic manufacturers 25 were reporting much higher multiples of WAC.</p>
<p style="text-align: right;">Page 119</p> <p>1 Q. When looking at a competitor's published 2 WAC price, how would Abbott know whether or not that 3 WAC price was, in fact, the wholesale invoice price? 4 A. I wouldn't. 5 Q. How would anybody, other than the drug 6 company itself, know whether its published WAC prices 7 were or were not actually the wholesale invoice 8 prices? 9 MR. BERLIN: Objection, form. 10 Objection to scope. 11 A. I don't even know whether I have knowledge 12 of how to answer that question. I -- 13 Q. (BY MR. ANDERSON): Is there any mechanism 14 that you're aware of to check that? 15 A. Not that I'm aware. 16 Q. Okay. Now I'm shifting a little bit -- we 17 were talking about primarily topic 2 there, sir. Now 18 I'm focussing more on topic 3. 19 Has Abbott in the past for the 20 erythromycin products reported AWP's to the compendias 21 such as First DataBank and Red Book? 22 A. Remember reported an estimated AWP until 23 about 2001 or 2002. 24 Q. And how was that represented? When -- when 25 the price report was actually made by Abbott to the</p>	<p style="text-align: right;">Page 121</p> <p>1 Q. (BY MR. ANDERSON): I under- -- I 2 understand your testimony about that conversation 3 between Ms. Morgan and Mr. Turon. 4 I'm really -- I was asking -- or 5 trying to ask a different question, and that is: 6 With respect to the actual representation of a column 7 of pricing with the title "AWP," what, if any, 8 information did Abbott have about the industry 9 practices of other drug companies? 10 MR. BERLIN: I'm sorry. Objection to 11 scope. 12 A. I -- I -- I don't know if we had any. 13 Q. (BY MR. ANDERSON): Along these lines, 14 Mr. Fiske, I'm going to have some exhibits for you. 15 (Exhibit 7 marked.) 16 Q. (BY MR. ANDERSON): If you could, take a 17 look at what's been marked as Exhibit 7. 18 A. (Reviews document.) 19 Q. Do you recognize this type of document? 20 A. I believe I've seen this document in 21 preparation for the deposition. 22 Q. In the lower right-hand corner, there's a 23 person's first initial and then a last name, P. 24 Lukas; is that correct? 25 A. Yes.</p>

31 (Pages 118 to 121)

<p style="text-align: right;">Page 122</p> <p>1 Q. Who is that?</p> <p>2 A. Peter Lukas. He works in Business Systems.</p> <p>3 Q. Business Systems being a -- a description</p> <p>4 of like a data function or a computer system</p> <p>5 function?</p> <p>6 A. Information technology group that supports,</p> <p>7 at that time, the Pricing and Contracting Department,</p> <p>8 among others.</p> <p>9 Q. I see. Okay. Thank you. And this is</p> <p>10 titled "PPD New Product Set-Up Process Map," correct?</p> <p>11 A. Correct.</p> <p>12 Q. In what context did you review this</p> <p>13 document in preparing to testify?</p> <p>14 A. It was just put in front of me, and I</p> <p>15 was -- I -- I don't think I can tell you what I was</p> <p>16 asked -- asked if I would -- had seen it before. And</p> <p>17 I said I may have seen documents similar to this; I</p> <p>18 didn't know whether I had seen this one or not.</p> <p>19 Q. What -- was this a document that was shown</p> <p>20 to you by a lawyer?</p> <p>21 A. It was.</p> <p>22 Q. Other than you, were there any other</p> <p>23 non-lawyers in the room?</p> <p>24 A. No.</p> <p>25 Q. Okay. I notice in the "Trade Relations"</p>	<p style="text-align: right;">Page 124</p> <p>1 MR. BERLIN: Can I -- I don't -- I</p> <p>2 want to try to get his -- broad of breadth as</p> <p>3 possible, but can you identify what topic this is</p> <p>4 under?</p> <p>5 MR. ANDERSON: Well, yeah. It- --</p> <p>6 it's some foundational stuff about price reporting,</p> <p>7 frankly, because my focus is on the next column, but</p> <p>8 I'm trying to, from a pure discovery standpoint,</p> <p>9 understand what "Pricing Operations" refers to there.</p> <p>10 MR. BERLIN: Okay. Well, I -- I'll</p> <p>11 object to scope as to the line of questioning, at</p> <p>12 least for now, and -- but go ahead and continue.</p> <p>13 MR. ANDERSON: Okay.</p> <p>14 Q. (BY MR. ANDERSON): I'll rephrase, sir, so</p> <p>15 the record is clear.</p> <p>16 What does "Pricing Oper- --</p> <p>17 Operations" refer to?</p> <p>18 MR. BERLIN: Same objection.</p> <p>19 A. It's Pricing Operations. It is a group</p> <p>20 within Pricing that has responsibility for cha- --</p> <p>21 processing chargebacks, rebates. They have</p> <p>22 responsibility for actually loading WAC pricing and</p> <p>23 list pricing into our internal systems.</p> <p>24 There are people that report in to the</p> <p>25 Pricing Operations manager, who have responsibility</p>
<p style="text-align: right;">Page 123</p> <p>1 section, there's some information listed. Is that</p> <p>2 basically some of the tasks that the Trade Relations</p> <p>3 department must perform when a new product is</p> <p>4 launched?</p> <p>5 A. Trade Relations doesn't set the launch</p> <p>6 date. They communicated in conjunction with the</p> <p>7 product team. Similarly, they -- they don't</p> <p>8 obviously get the FDA approval. They communicate or</p> <p>9 share some of that information, but, in fact, it</p> <p>10 comes from our Regulatory Affairs group.</p> <p>11 A lot of information on here is</p> <p>12 inaccurate, actually, we'll -- I imagine we'll get to</p> <p>13 other columns, but -- I just wanted to point out that</p> <p>14 Peter's complete under- -- Peter's understanding is</p> <p>15 not a hundred percent factual and correct about what</p> <p>16 people do.</p> <p>17 Q. Right. Like, for instance, Trade Relations</p> <p>18 may not get the actual FDA approval, but they may be</p> <p>19 in charge of obtaining that information from the</p> <p>20 Regulatory group at Abbott and, in turn, sharing that</p> <p>21 with the IT function?</p> <p>22 A. That's correct.</p> <p>23 Q. Okay. Okay. The last item there read- --</p> <p>24 under "Trade Relations" reads "Notify: Pricing</p> <p>25 Operations". What does that refer to?</p>	<p style="text-align: right;">Page 125</p> <p>1 for communicating information to the data vendors at</p> <p>2 the time that a product is launched, as well as to</p> <p>3 wholesalers and selected other customers.</p> <p>4 Q. (BY MR. ANDERSON): And -- and while deal</p> <p>5 prices were in effect for the erythromycins prior to</p> <p>6 July of '03, they would have also been loading the</p> <p>7 deal prices for purposes of processing chargebacks,</p> <p>8 correct?</p> <p>9 A. The people -- I don't know. There -- there</p> <p>10 are a group of people that handled -- people who are</p> <p>11 responsible for responding to bids and quotes were</p> <p>12 responsible for loading contract pricing. I actually</p> <p>13 think it would have been done by that function rather</p> <p>14 than the Pricing Operations people, because base deal</p> <p>15 pricing was actually a contract price. It was not a</p> <p>16 WAC or a list price.</p> <p>17 Q. Look, if you could, at the lower row and</p> <p>18 the far left-hand side. Do you see that row that --</p> <p>19 I mean that column that reads "Pricing Operations"</p> <p>20 "Tina Calvert"?</p> <p>21 A. Yes.</p> <p>22 Q. And then the second paragraph reads, If</p> <p>23 "Deal" setup AES item master with "Deal" pricing.</p> <p>24 Did I read that correctly?</p> <p>25 A. I'm -- I'm apparently mistaken. I -- I</p>

32 (Pages 122 to 125)

<p style="text-align: right;">Page 126</p> <p>1 apologize. It wasn't intentional. 2 Q. All right. 3 A. I -- I said I wasn't certain. I -- I -- 4 I thought it could have been the other group, but... 5 Q. I know. I -- I appreciate that. That's 6 why I was pointing this out to you. 7 A. Okay. 8 Q. Does that indicate to you, sir, that the 9 Pricing Operations personnel would be inputting base 10 deal pricing information for purposes -- 11 A. No. 12 Q. -- purposes of -- 13 A. I -- I may not be wrong in terms of my 14 supposition that it was the other people, and the 15 reason I respond this way is because when a product 16 launches into the marketplace, for a very brief 17 period of time, we have a deal on the initial 18 purchase by wholesalers -- and it may only be this 19 deal. 20 Now, it may be base deal as well, but 21 it -- it may be limited to this type of deal, because 22 the other is a contract price. This -- this could be 23 eval- -- could be looked upon as a contract price as 24 well also. 25 MR. BERLIN: And that was --</p>	<p style="text-align: right;">Page 128</p> <p>1 information to the Medicaid agencies regarding new 2 product launches, providing them copies of the new 3 product inserts and the pricing information at the 4 time that a product is launched. 5 Q. Why does Abbott provide the pricing 6 information to the Medicaid programs? 7 A. Well, you know, we have a Medicaid rebate 8 agreement like many manufacturers, and we want to 9 ensure that our products are all listed by the 10 various states and that the patients have access to 11 these drugs. 12 Q. By reporting the pricing information to the 13 Medicaid programs at launch, is Abbott providing 14 information that will set Medicaid reimbursement? 15 A. I don't know. 16 MR. BERLIN: I just -- 17 Q. (BY MR. ANDERSON): Do you think -- 18 MR. BERLIN: I'm sorry. I -- I do 19 want -- can I have a continuing objection to the line 20 of questioning as to scope, or do you want me to 21 voice it at each question? 22 MR. ANDERSON: I -- you can just say 23 "scope" if you -- you know, "Objection, scope". 24 MR. BERLIN: Okay. 25 MR. ANDERSON: It won't be that</p>
<p style="text-align: right;">Page 127</p> <p>1 A. I don't know. I don't know the answer to 2 your question. 3 MR. BERLIN: I -- I'm sorry. And that 4 was part of my objection is that this is lea- -- I -- 5 I don't know this document and -- but it does -- is 6 labeled "New Product" and none of the -- the -- we're 7 not dealing with new products in the case. 8 So I -- again, I'll object to scope, 9 but, I mean, you -- I'm not -- certainly not at this 10 point stopping him from answering his questions. 11 Q. (BY MR. ANDERSON): What -- what is the 12 "AES item master"? 13 A. I don't know. 14 Q. Looking at the second from the right column 15 on the upper portion of the document that reads 16 "Government Reimbursement" "Deb DeYoung"? 17 A. Yes. 18 Q. What is that column referring to? 19 A. Well, that's -- that's one of the items 20 where I take issue to the things that are worded, 21 because it -- it suggests that she determines what 22 Medicaid reimbursement is going to be for products, 23 and clearly Abbott doesn't determine what Medicaid 24 reimbursement is going to be for a product. 25 What she does do is communicate</p>	<p style="text-align: right;">Page 129</p> <p>1 disruptive. 2 Q. (BY MR. ANDERSON): Mr. Fiske, do you 3 believe that the reason the reference here is made to 4 setting Medicaid reimbursement is that Abbott 5 appreciated, when it was reporting pricing 6 information to the Medicaid programs, that that 7 information was being used? 8 MR. BERLIN: Objection, form. 9 Objection, scope. 10 A. I don't know. 11 Q. (BY MR. ANDERSON): Does it seem 12 reasonable, sir, that Abbott -- strike that. 13 As the corporate representative, is it 14 true, sir, that Abbott knew, when it was reporting 15 pricing information to the Medicaid programs, that 16 Medicaid programs would, in turn, be using that 17 information to determine drug reimbursements? 18 MR. BERLIN: Objection, form. 19 Objection scope. 20 A. I don't know whether they relied on that 21 information solely or not. There was a lot of 22 information we provided to CMS that they apparently 23 didn't rely on that they could have, such as our 24 AMPs. 25 MR. ANDERSON: Objection,</p>

Page 130

1 nonresponsive.
 2 Q. (BY MR. ANDERSON): Sir, I'm asking about
 3 the information provided to the state Medicaid
 4 programs at launch. The AMPs can't be provided at
 5 launch, can they?
 6 A. That's a true statement.
 7 Q. Okay. With respect to the information that
 8 Abbott was reporting to the Medicaid programs
 9 directly at launch, did Abbott expect that the
 10 Medicaid programs would be using that pricing
 11 information to set drug reimbursement?
 12 MR. BERLIN: Objection, form.
 13 Objection, scope.
 14 A. I -- I'm assuming that -- there is a
 15 practice in place -- I apologize that I don't know
 16 the answer to your questions, but I -- I -- it may
 17 very well have been for that reason.
 18 We always reported our WAC and our
 19 list price to the Medicaid agencies along with the
 20 other product indicative information, the -- a copy
 21 of the product insert, etcetera, and, I'm assuming,
 22 so that it would be reimbursed by the states --
 23 reimbursable by the states so they'd have a reference
 24 point. But I don't know.
 25 Q. (BY MR. ANDERSON): In addition to the WAC

Page 131

1 and the list price, is it true that over the years
 2 Abbott, also provided the AWP prices?
 3 A. There were -- some period of time when I
 4 believe that AWP prices were provided. They have not
 5 been provided more recently, probably since -- I
 6 don't know when we stopped reporting it.
 7 (Exhibit 8 marked.)
 8 Q. (BY MR. ANDERSON): Now, if you could, take
 9 a look at Exhibit 8 which may bear upon this.
 10 A. (Reviews document.)
 11 Q. Do you recognize this document as a
 12 document pertaining to the launch of a new product?
 13 MR. BERLIN: Objection, scope.
 14 A. I don't know recognize the document.
 15 Q. (BY MR. ANDERSON): Do you see toward the
 16 bottom of the first page the second to last bullet
 17 reads "Notification of State Medications"?
 18 MR. BERLIN: Objection, scope.
 19 A. I see the bullet.
 20 Q. (BY MR. ANDERSON): And then below that,
 21 another bullet that reads "Notification to data
 22 service companies"?
 23 MR. BERLIN: Objection, scope.
 24 A. I see that.
 25 Q. (BY MR. ANDERSON): What --

Page 132

1 A. This is a variable document. It certainly
 2 precedes 1994 because I believe that Kay Morgan was
 3 gone by that point in time.
 4 Q. Do you believe that the pricing information
 5 that is included in the notifications to state
 6 Medicaid programs and the data service companies
 7 included not only WAC and list but also AWP?
 8 MR. BERLIN: Objection, scope.
 9 A. I told you that for a period of time I
 10 believe that that information was reported to the
 11 data agencies.
 12 Q. (BY MR. ANDERSON): And --
 13 A. And that it was discontinued in the 2002
 14 time frame.
 15 Q. 2002?
 16 A. I believe that's correct.
 17 Q. Okay.
 18 A. 2001, 2002 time frame.
 19 Q. All right. Looking at the middle of the
 20 list of bullets, do you see one that reads "Pricing,
 21 dash, WAC, comma, LIST & estimated AWP"?
 22 MR. BERLIN: Objection, scope.
 23 A. Yes.
 24 Q. (BY MR. ANDERSON): How did Abbott set the
 25 estimated AWPs?

Page 133

1 A. Basically reverse-engineering. We looked
 2 at what the data agencies -- agencies were
 3 reporting. And you can see that they have -- who
 4 knows what their formula is, but it -- the numbers
 5 that they reported were generally 125 percent of our
 6 WAC -- not consistently, not consistently across data
 7 vendors, and not consistently even within a single
 8 data vendor.
 9 Q. Well, with respect to the launch of a
 10 product, how could Abbott reverse-engineer an AWP
 11 that hasn't yet been published?
 12 MR. BERLIN: Objection, form.
 13 Objection, scope.
 14 A. If the data agencies are consistently
 15 applying what appears to be a formula of 125 percent
 16 of WAC, I think it's a reasonable conclusion that you
 17 can estimate an AWP on that same basis, especially
 18 given that they've communicated to you that they go
 19 out and actually verify what the correct AWP should
 20 be.
 21 Q. (BY MR. ANDERSON): Are you aware of any
 22 instances where the estimated AWP published by Abbott
 23 to the pricing compendia was not ultimately published
 24 by the pricing compendia?
 25 MR. BERLIN: Objection, form.

34 (Pages 130 to 133)

<p style="text-align: right;">Page 134</p> <p>1 Objection, scope. 2 A. No, I'm not. 3 Q. (BY MR. ANDERSON): Are you aware of any 4 information where the estimated AWP reported by 5 Abbott to the compendia was somehow disputed by a 6 wholesaler? 7 MR. BERLIN: Objection, form. 8 Objection, scope. 9 A. Well, I wasn't the one that was verifying 10 it with the wholesaler, so I wouldn't have been aware 11 of that. It would have been First DataBank or other 12 data vendors that were doing that verification 13 process. You'd have to ask them. 14 (Exhibit 9 marked.) 15 Q. (BY MR. ANDERSON): Mr. Fiske, please take 16 a look at what's been marked as Exhibit 9. 17 A. Am I missing an 8? Oh, never mind. I've 18 got it. (Reviews document.) 19 Q. Do you recognize any of the pages shown in 20 Exhibit 9? 21 A. I don't recognize this document. I don't 22 think I've seen it before. 23 Q. Have you seen these types of documents 24 before? 25 MR. BERLIN: Objection, form.</p>	<p style="text-align: right;">Page 136</p> <p>1 Q. And there's -- I notice the first page is a 2 fax cover sheet from Abbott in this case to Medical 3 Economics, correct? 4 A. Yes. 5 Q. Do you believe that this same type of fax 6 cover sheet would have been utilized to transmit the 7 same type of information to First DataBank as well? 8 A. Something similar to that. 9 Q. So looking at the second page of Exhibit 9, 10 I -- do you agree with me that that is a form cover 11 letter that Abbott would create to transmit 12 information to data vendors? 13 A. I would agree with that, yes. 14 Q. And the data vendors would include First 15 DataBank and Red Book and Medi-Span, correct? 16 A. Yes. 17 Q. And those are the same three data service 18 companies that were referenced at the bottom of the 19 first page of Exhibit 8, correct? 20 A. (Reviews document.) Yes. 21 Q. Why did -- 22 A. Well, two of them. 23 Q. Why -- why did Abbott report information to 24 the data vendors such as that shown in Exhibit 9? 25 MR. BERLIN: Objection, form, asked</p>
<p style="text-align: right;">Page 135</p> <p>1 A. I think I've seen something similar to 2 this. 3 Q. (BY MR. ANDERSON): Which -- which page or 4 pages are similar to what you've seen before? 5 A. (Reviews document.) I saw some document 6 in preparing for the deposition that showed receipt 7 by First -- by Red Book, actually. I don't recall 8 whether it was an Ery price list or not. I -- I 9 can't recall. 10 Q. And it -- it looked -- it had the same type 11 of form cover letter that's shown on the second page 12 of Exhibit 9? 13 A. I'm -- I'm -- I'm sorry. I recall this 14 (indicating). 15 Q. The stamp? 16 A. The stamp, that's all I specifically 17 recall. 18 Q. All right. 19 A. I don't -- I don't remember what we 20 reviewed. 21 Q. Does Exhibit 9 appear to you, sir, to be an 22 example of a standard communication that Abbott sent 23 out to the pricing compendia? 24 A. It -- it looks like a communication to a 25 pricing compendia, yes.</p>	<p style="text-align: right;">Page 137</p> <p>1 and answered. 2 A. It was our standard practice whenever we 3 launched a product to report the pricing information 4 to the data vendors. It had always been done. 5 Q. (BY MR. ANDERSON): Other than the fact 6 that it was something Abbott itself had always done, 7 was there any other information that underlied Abbott 8 reporting this type of information to the data 9 vendors? 10 A. Not that I became aware of during my 11 investigation. 12 Q. I notice on the third page of Exhibit 9 is 13 the beginning of a price list, correct? 14 A. Yes. 15 Q. And there's -- there's three different 16 types of prices listed. One is list price, the other 17 is case price, and the last one is AWP price, 18 correct? 19 A. Yes. 20 Q. And so those would be prices that Abbott 21 had set and, in turn, communicated to the data 22 vendors, correct? 23 A. Yes. 24 Q. How did Abbott -- 25 A. Well, we communicated an estimated AWP. We</p>

35 (Pages 134 to 137)

<p style="text-align: right;">Page 138</p> <p>1 set the WAC and the list price.</p> <p>2 Q. Where --</p> <p>3 A. The WAC price being the case price.</p> <p>4 Q. Where is the AWP information noted to be an</p> <p>5 estimate?</p> <p>6 A. I'm telling you that it was always an</p> <p>7 estimate. We actually changed the column at a</p> <p>8 subsequent date to read that it was an estimate to</p> <p>9 avoid any confusion.</p> <p>10 Q. How might it be confusing if the AWP</p> <p>11 weren't noted to be an estimate?</p> <p>12 A. I don't have an answer for that question.</p> <p>13 Q. Do you agree that to the extent Abbott was</p> <p>14 reporting, quote, "AWPs" to the data vendors, it</p> <p>15 would appear that Abbott is setting the AWPs?</p> <p>16 MR. BERLIN: Objection, form.</p> <p>17 Objection, scope.</p> <p>18 A. I don't agree with that.</p> <p>19 Q. (BY MR. ANDERSON): What information would</p> <p>20 indicate that Abbott is not controlling this AWP?</p> <p>21 A. Pardon me?</p> <p>22 MR. BERLIN: Objection, form.</p> <p>23 Objection, scope.</p> <p>24 Q. (BY MR. ANDERSON): What -- what</p> <p>25 information would indicate that Abbott is not</p>	<p style="text-align: right;">Page 140</p> <p>1 I -- actually, it's called Abbott Nutritionals, Inc.</p> <p>2 today, which is a division of Abbott Laboratories.</p> <p>3 Q. Was he with Ross when he had this</p> <p>4 conversation with Kay?</p> <p>5 A. No. He worked in the Pharmaceutical</p> <p>6 Products Division as Pricing Operations Manager.</p> <p>7 Q. Other than the conversation between Kay and</p> <p>8 Mark that occurred sometime between 1991 and 1999, is</p> <p>9 there any other information that would indicate that</p> <p>10 Abbott did not set the AWPs?</p> <p>11 MR. BERLIN: Objection, form.</p> <p>12 Objection, scope.</p> <p>13 A. For the period nine- -- of between 1991 and</p> <p>14 1999?</p> <p>15 Q. (BY MR. ANDERSON): No, for -- for the</p> <p>16 entire time period of this case, from '94 through the</p> <p>17 present.</p> <p>18 A. Yes, there is.</p> <p>19 Q. What's that information?</p> <p>20 A. So -- at later dates they were actually</p> <p>21 labeled as estimated AWPs. At later dates they</p> <p>22 weren't provided, and if asked for, we declined to</p> <p>23 provide them because we indicated that that</p> <p>24 information was information that Abbott did not set;</p> <p>25 that that information, if it was desired, could be</p>
<p style="text-align: right;">Page 139</p> <p>1 controlling the setting of these AWPs?</p> <p>2 MR. BERLIN: Objection, form.</p> <p>3 Objection, scope.</p> <p>4 A. There's no information on this sheet that</p> <p>5 says that.</p> <p>6 Q. (BY MR. ANDERSON): Is there any</p> <p>7 information other -- beyond this sheet that you know</p> <p>8 of?</p> <p>9 MR. BERLIN: Objection, form.</p> <p>10 Objection, scope. But you -- you can answer.</p> <p>11 A. All -- all I can continue to go back to,</p> <p>12 Mr. Anderson, is the conversation that Mark Turon</p> <p>13 had, for example, with Kay Morgan; that despite the</p> <p>14 fact that manufacturers may have been providing</p> <p>15 estimated AWPs, that the data vendors, especially</p> <p>16 First DataBank, was actually verifying or confirming</p> <p>17 what a correct AWP should be with the wholesalers</p> <p>18 themselves.</p> <p>19 Q. (BY MR. ANDERSON): Did Mark indicate how</p> <p>20 long that conversation list- -- lasted?</p> <p>21 A. No, he didn't. Knowing Mark Turon, it</p> <p>22 could have been an hour. He's a very -- very</p> <p>23 talkative man.</p> <p>24 Q. And Mr. Turon is still with Abbott today?</p> <p>25 A. He -- he works for Ross Pharmaceuticals.</p>	<p style="text-align: right;">Page 141</p> <p>1 obtained from the data agencies themselves.</p> <p>2 Q. Okay. And that -- those types of notations</p> <p>3 about an estimate began sometime around 2001, 2002,</p> <p>4 correct?</p> <p>5 A. In 2000 we still reported AWPs. Beginning</p> <p>6 in 2001, I believe we reported estimated AWPs, and we</p> <p>7 stopped reporting AWPs in 2002.</p> <p>8 Q. Well, that was going to be my next</p> <p>9 question. And since 2002, has Abbott done anything</p> <p>10 to alter the information it conveys concerning AWP,</p> <p>11 if -- if any?</p> <p>12 MR. BERLIN: I -- I -- objection,</p> <p>13 form.</p> <p>14 A. For the most part, we do not communicate</p> <p>15 AWPs to anybody. There are some exceptions to that.</p> <p>16 But for the most part, if somebody asks us for an AWP</p> <p>17 or asks us to verify an AWP, we tell people where</p> <p>18 that information can be obtained rather than</p> <p>19 providing it. We have some exceptions to that, in</p> <p>20 terms of we can provide AWP information to some of</p> <p>21 our managed care customers.</p> <p>22 Q. (BY MR. ANDERSON): You mentioned the</p> <p>23 verification of an AWP. Do you know whether or not</p> <p>24 Abbott has been verifying AWPs published by the</p> <p>25 compendia in recent years?</p>

36 (Pages 138 to 141)

<p style="text-align: right;">Page 142</p> <p>1 MR. BERLIN: Objection, form. 2 Objection, scope. 3 A. I don't believe we've been verifying AWP 4 in recent years. 5 Q. (BY MR. ANDERSON): How has Abbott 6 responded to requests from pricing compendia, if any, 7 for verification of AWP in the past three or four 8 years? 9 MR. BERLIN: Objection, scope. 10 A. Pricing compendia? 11 Q. (BY MR. ANDERSON): Pricing services, like 12 First DataBank or Red Book. 13 A. Asking us to verify AWP? 14 Q. Yes, sir. 15 A. The only situation I'm aware of where 16 anybody approached us regarding an AW- -- telling us 17 what an AWP would -- I'm sorry. Let me... 18 The only situation I'm aware of where 19 there was a discussion regarding an AWP by a pricing 20 compendia to Abbott was an exchange from Red Book 21 actually telling us that if we did not give them an 22 AWP, that they would set the AWP at, I believe it 23 was, 120 percent of our WAC. 24 I believe we responded to that with an 25 e-mail indicating that we did not set AWP for our</p>	<p style="text-align: right;">Page 144</p> <p>1 agencies themselves. 2 Q. When did -- well, no, I'm -- I'm talking 3 about communications from the data agencies, so I'll 4 rephrase to be more specific. 5 Currently, sir, is it Abbott's 6 practice to reply to a data vendor or a data service 7 such as First DataBank or Red Book's request for 8 Abbott to verify an AWP to instruct that data service 9 that Abbott will not verify the AWP? 10 A. We tell them that we do not set AWP, that 11 however they choose to calculate that is their 12 methodology and it's their business. 13 (Exhibit 10 marked.) 14 Q. (BY MR. ANDERSON): Let me show you a 15 document, and I'll put some specifics on this and it 16 may assist the questioning. 17 Take a look, if you could, at Fiske 18 Exhibit 10. 19 A. (Reviews document.) 20 MR. BERLIN: Can you show this to 21 him? It's Red Book -- produced by Red Book and 22 marked "Confidential". 23 MR. ANDERSON: Yeah. It's produced in 24 the MDL. It's part of the Red Book production. We 25 actually deposited Red Book. Y'all were there.</p>
<p style="text-align: right;">Page 143</p> <p>1 product; that they had their own business practices 2 that they -- they should evaluate and follow and do 3 whatever they saw was appropriate. 4 I don't know if that's a correct 5 representation exactly of what was said, but that's 6 the thought process. 7 Q. What information do you have to underlie 8 that statement? 9 A. What information do I have? 10 Q. Uh-huh. 11 A. I can tell you that I've actually seen 12 those e-mail exchanges in the last couple of days in 13 preparing for this. 14 Q. What was the time period for those e-mail 15 exchanges? 16 A. Hmm. Probably more than three years ago, 17 but I don't think it was more than six years ago. I 18 don't know exactly the date. 19 Q. Prior to -- well, strike that. 20 Is it your understanding that 21 currently Abbott refuses to verify any AWP published 22 by First DataBank or Red Book? 23 A. We don't set AWP, and we will not confirm 24 them. We ask people -- or suggest to people if they 25 need to confirm them, that they do so with the data</p>	<p style="text-align: right;">Page 145</p> <p>1 MR. BERLIN: No, no, I know, but is 2 there any -- I -- I -- it's not my client, so it's 3 not -- I just raise this if we need some protection 4 as to whether we can show him -- 5 MR. ANDERSON: Oh, oh, oh. 6 MR. BERLIN: -- documents produced by 7 Red Book that are marked "Confidential". 8 MR. ANDERSON: Oh, I'm -- the pro- -- 9 I'm pretty sure the pro- -- I'm positive the 10 protective order has allowances for using documents 11 with witnesses. 12 MR. BERLIN: Okay. I'll -- I just 13 wanted to raise the issue. I'm -- 14 MR. ANDERSON: Yeah. 15 MR. BERLIN: I -- I'll -- I -- I just 16 am not party to it. 17 MR. ANDERSON: Yeah. 18 MR. BERLIN: If your -- that's your 19 representation that we're operating under -- 20 MR. ANDERSON: Well, I mean, we're all 21 operating under the MDL protective order. I -- you 22 know, if we need to get him to execute a -- 23 MR. BERLIN: I just didn't -- 24 MR. ANDERSON: -- compliance 25 agreement --</p>

37 (Pages 142 to 145)

<p style="text-align: right;">Page 146</p> <p>1 MR. BERLIN: -- remember what the -- 2 the procedure is because I haven't faced that issue 3 rec- -- at least not recently. 4 MR. ANDERSON: Yeah. 5 MR. BERLIN: So I just wanted to make 6 sure that we weren't doing anything to upset some 7 other party. 8 A. (Reviews document.) Yes. 9 Q. (BY MR. ANDERSON): Have you finished your 10 review of Exhibit 10? 11 A. I have. 12 Q. Have you seen documents similar to this 13 before? 14 MR. BERLIN: Objection, form. 15 A. No. 16 Q. (BY MR. ANDERSON): Does this appear to be 17 a document sent by Red Book to Abbott requesting 18 price verification? 19 A. Yes. 20 Q. And it's titled "Abbott Pharmaceutical 21 Micromedex Price List Verification 2004," correct? 22 A. Yes. 23 Q. And then, in turn, do you agree that there 24 appears to be handwritten notes and signatures on the 25 pages by April Gerzel of Abbott?</p>	<p style="text-align: right;">Page 148</p> <p>1 AWP for all of the products. 2 MR. BERLIN: That are listed here. 3 A. That are listed here. 4 Q. (BY MR. ANDERSON): In looking at the page 5 that's down in the lower right-hand corner Bates 6 labeled Red Book 01344? 7 A. Yes. 8 Q. Do you see Ms. Gerzel's signature there? 9 A. I do. 10 Q. And it's dated October 10th, 2003, correct? 11 A. Yes. 12 Q. And there's a listing there of various AWP 13 and WAC prices for erythromycin products, correct? 14 A. Yeah. 15 Q. And those are Abbott's products, correct? 16 A. Yes. 17 Q. And she has marked the box that says "OK as 18 is"; is that right? 19 A. Yes. 20 Q. Did Ms. Gerzel have the authority to make 21 that notation? 22 A. Yes, with respect to the WACs and the list 23 prices. 24 Q. Do you see anywhere on this document where 25 Ms. Gerzel is notifying Red Book that the AWP are</p>
<p style="text-align: right;">Page 147</p> <p>1 A. Yes. 2 Q. April Gerzel works in your Pricing 3 department at Abbott, correct? 4 A. She does. 5 Q. And in the 2003 time frame, did she have 6 authority to correspond with the pricing services 7 such as Red Book? 8 A. Part of her responsibilities was reporting 9 our WAC and our list price to the data agencies. 10 Q. Did April have the authority to verify 11 AWP's? 12 A. She had the authority to verify the WAC and 13 the list price. 14 Q. Okay. In looking at the pricing 15 verification listing with all the NDC numbers which 16 starts on the fourth page of Exhibit 10, do you see 17 there a pricing column for "AWP" as well as "WAC"? 18 A. I do. 19 Q. And those -- that pricing column is 20 populated with prices for each of these drugs, 21 correct? 22 A. It is. 23 Q. Including the erythromycin products, 24 correct? 25 A. (Reviews document.) It's populated with an</p>	<p style="text-align: right;">Page 149</p> <p>1 not verified? 2 A. No, but I would like to point out that on 3 the pages where she corrects the WAC and the list 4 price, she makes no change to the AWP, which implies 5 that she is not doing anything to establish what an 6 AWP should be, either right or wrong. 7 For example, if you look at 1345, 8 you'll note that she made numerous changes where the 9 WAC and the list prices that she corrected were 10 higher than the old ones. And, clearly, she was not 11 suggesting any change to AWP, implying that she does 12 nothing to verify or set such numbers. 13 Q. When -- when -- 14 A. It doesn't state that on the form, I'll say 15 that. I -- you asked me that question and I'll agree 16 with that, but I think you need to draw some 17 conclusions from what you see as well. 18 Q. Did Abbott understand that when it changed 19 its published WAC prices, that, in turn, there would 20 be changes in the published AWP prices? 21 MR. BERLIN: Objection to form. 22 Objection to scope. 23 A. It was often the case -- I'm assuming that 24 the data agencies did their homework and confirmed 25 what the correct information should be with the</p>

38 (Pages 146 to 149)

<p style="text-align: right;">Page 150</p> <p>1 wholesalers.</p> <p>2 MR. BERLIN: Is your answer complete?</p> <p>3 I -- I -- I just want to --</p> <p>4 THE WITNESS: Yes.</p> <p>5 MR. BERLIN: Okay. Because I want to</p> <p>6 say -- so it won't be an issue of coaching is just --</p> <p>7 you need to make sure that you're testifying within</p> <p>8 the scope, and none of ours permit general testimony</p> <p>9 about what Abbott knew or what Abbott understood and</p> <p>10 you're --</p> <p>11 I'm not stopping you from testifying.</p> <p>12 It's just important as a corporate representative,</p> <p>13 you maintain your testimony within the scope.</p> <p>14 Q. (BY MR. ANDERSON): Why didn't Abbott</p> <p>15 notify Red Book that it would refuse to verify AWP's?</p> <p>16 MR. BERLIN: Objection, form.</p> <p>17 Objection, scope.</p> <p>18 A. I don't know why April didn't do that on</p> <p>19 here.</p> <p>20 Q. (BY MR. ANDERSON): Is there -- is there a</p> <p>21 time when Abbott began notifying the data services</p> <p>22 such as First DataBank and Red Book that it would not</p> <p>23 be verifying AWP's?</p> <p>24 A. I don't think that we sent out a</p> <p>25 notification that we wouldn't be verifying them.</p>	<p style="text-align: right;">Page 152</p> <p>1 A. Yes, they were.</p> <p>2 (Exhibit 11 marked.)</p> <p>3 Q. (BY MR. ANDERSON): If you could, take a</p> <p>4 look at another example which is marked as Exhibit</p> <p>5 No. 11.</p> <p>6 A. (Reviews document.)</p> <p>7 Q. In looking at Exhibit 11 --</p> <p>8 MR. BERLIN: Hold on. I think he's</p> <p>9 still --</p> <p>10 MR. ANDERSON: Oh.</p> <p>11 MR. BERLIN: -- looking. I'm sorry.</p> <p>12 MR. ANDERSON: Oh, I thought he was</p> <p>13 done. I'm sorry.</p> <p>14 THE WITNESS: He can -- he can go.</p> <p>15 A. You can go.</p> <p>16 Q. (BY MR. ANDERSON): Okay. Mr. Fiske, in</p> <p>17 reviewing Exhibit No. 11, do you agree this appears</p> <p>18 to be another product verification form completed by</p> <p>19 Abbott?</p> <p>20 A. It appears to be.</p> <p>21 Q. And this one also includes the pricing</p> <p>22 information for the erythromycin products including</p> <p>23 AWP's and WAC's, and it's signed by Tina Calvert,</p> <p>24 correct?</p> <p>25 A. The front page is signed by Tina.</p>
<p style="text-align: right;">Page 151</p> <p>1 Rather, when we -- it- -- it's my understanding that</p> <p>2 these come on an annual basis from some of the data</p> <p>3 vendors where they ask us to verify WAC's and list</p> <p>4 prices, and that if some -- such information came</p> <p>5 after a certain point in time, we would have declined</p> <p>6 to verify the AWP. I don't know why it wasn't done</p> <p>7 in this particular case.</p> <p>8 Q. Have you seen any documentation where</p> <p>9 Abbott has notified the data services that it refuses</p> <p>10 to verify AWP?</p> <p>11 A. I didn't see any. I was basing that on</p> <p>12 some conversations that I had had with April.</p> <p>13 Q. In preparing to testify?</p> <p>14 A. Yes.</p> <p>15 Q. Recently?</p> <p>16 A. Yes.</p> <p>17 Q. Has Tina Calvert also been responsible for</p> <p>18 communicating pricing information from Abbott to the</p> <p>19 data services?</p> <p>20 A. She was at one point in time, yes.</p> <p>21 Q. And when Ms. Calvert or Ms. Gerzel or other</p> <p>22 responsible persons in Abbott were completing these</p> <p>23 price verifications from Abbott or First DataBank on</p> <p>24 an annual basis, were they doing so within the course</p> <p>25 and scope of their employment?</p>	<p style="text-align: right;">Page 153</p> <p>1 Q. Yes, sir. In looking at the page that's</p> <p>2 Bates labeled 1139?</p> <p>3 A. Yes.</p> <p>4 Q. You see that page contains the pricing for</p> <p>5 some erythromycin products, correct?</p> <p>6 A. It does.</p> <p>7 Q. And over in the far right-hand column,</p> <p>8 there's a field titled "Effective Change/Deact Date,"</p> <p>9 correct?</p> <p>10 A. Uh-huh. Yes.</p> <p>11 Q. And then for these erythromycin products,</p> <p>12 there's a -- most of them, there's a price change</p> <p>13 date of July 2nd, 1999, correct?</p> <p>14 A. Yes.</p> <p>15 Q. Do you have any understanding of the</p> <p>16 circumstances surrounding price changes instituted in</p> <p>17 July of '99?</p> <p>18 MR. BERLIN: Objection, scope.</p> <p>19 A. Yes.</p> <p>20 Q. (BY MR. ANDERSON): Why were the -- when --</p> <p>21 how were the prices changed on the erythromycins in</p> <p>22 July of '99?</p> <p>23 A. I can't remember the specific percentage</p> <p>24 change, but they were increased at that time.</p> <p>25 Q. And why were they increased?</p>

39 (Pages 150 to 153)

<p style="text-align: right;">Page 154</p> <p>1 A. Because competitive circumstances permitted</p> <p>2 us to do so.</p> <p>3 Q. Were the chain and retail buying group</p> <p>4 prices also increased in July of '99?</p> <p>5 A. I don't know think so.</p> <p>6 Q. What competitive circumstances are you</p> <p>7 referring to that allowed the WAC prices to be</p> <p>8 increased?</p> <p>9 A. It had been -- to my best recollection, it</p> <p>10 had been a couple of years since we had taken a price</p> <p>11 increase, there had been inflation over that period</p> <p>12 of time, and we determined that we should increase</p> <p>13 our WAC and our list price and take advantage of the</p> <p>14 incremental margin it would generate for us.</p> <p>15 Q. When Abbott did that, did it appreciate</p> <p>16 that in July of '99 or shortly thereafter its</p> <p>17 published AWP prices would also be increasing?</p> <p>18 A. I don't know that we ever took that into</p> <p>19 consideration. It's not something that we generally</p> <p>20 would have thought about.</p> <p>21 Q. Is there any reason why Abbott, in July</p> <p>22 of '99, would not have understood that its AWPs would</p> <p>23 have gone up as a result of its increased WACs?</p> <p>24 MR. BERLIN: Objection, form.</p> <p>25 Objection, scope.</p>	<p style="text-align: right;">Page 156</p> <p>1 A. -- interaction that we had with the data</p> <p>2 agencies was to report our WAC and list price. I</p> <p>3 understand this is a verification form. We took no</p> <p>4 steps to change the AWP that they were reporting.</p> <p>5 Q. Okay. And so -- as -- as a specific</p> <p>6 example, for instance, in July of '99 when Abbott</p> <p>7 raised its WAC prices, it notified the data agencies</p> <p>8 including Red Book, correct?</p> <p>9 A. Yes.</p> <p>10 Q. And then subsequent to that time period,</p> <p>11 the data agencies, like First DataBank and Red Book,</p> <p>12 published those WACs as well as increased AWPs,</p> <p>13 correct?</p> <p>14 A. I'm assuming that's a correct conclusion.</p> <p>15 I know they published the new WACs and list prices,</p> <p>16 but I don't monitor the AWPs for the erythromycins.</p> <p>17 Q. And then subsequent to that publication by</p> <p>18 Red Book and First DataBank, Abbott would have been</p> <p>19 made aware of that increased AWP through a</p> <p>20 verification form such as Exhibit 11, correct?</p> <p>21 MR. BERLIN: Objection, form.</p> <p>22 Objection, scope.</p> <p>23 A. The form was sent to an Abbott person.</p> <p>24 Q. (BY MR. ANDERSON): And in turn, Abbott</p> <p>25 took no steps to stop the publication of the</p>
<p style="text-align: right;">Page 155</p> <p>1 A. No, but it's not something that we would</p> <p>2 have taken into consideration in terms of the price</p> <p>3 increase. It didn't influence our price increase in</p> <p>4 any way.</p> <p>5 Q. (BY MR. ANDERSON): Oh, I see. You're</p> <p>6 saying you -- you agree that Abbott would have known</p> <p>7 of the cause-and-effect relationship, but you're</p> <p>8 saying the fact that the AWP would go up was not the</p> <p>9 influencing factor to cause Abbott to raise the WACs?</p> <p>10 MR. BERLIN: Objection, form.</p> <p>11 Objection, scope.</p> <p>12 A. I think we were familiar with the fact that</p> <p>13 when Abbott took price increases, data agencies</p> <p>14 generally changed the AWP for our products. It</p> <p>15 didn't influence our pricing decision.</p> <p>16 Q. (BY MR. ANDERSON): And so if you're</p> <p>17 looking at this page of Exhibit 11, for instance,</p> <p>18 where these AWPs are being published by Red Book and</p> <p>19 sent to Abbott in late 2002, Abbott didn't take any</p> <p>20 steps to lower these AWPs back down to where they</p> <p>21 were before 1999, correct?</p> <p>22 MR. BERLIN: Objection, form.</p> <p>23 Objection, scope.</p> <p>24 A. The only --</p> <p>25 Q. (BY MR. ANDERSON): I'll rephrase.</p>	<p style="text-align: right;">Page 157</p> <p>1 increased AWP?</p> <p>2 MR. BERLIN: Objection, form.</p> <p>3 Objection, scope.</p> <p>4 A. No.</p> <p>5 Q. (BY MR. ANDERSON): I'll rephrase. I think</p> <p>6 I got an answer, but I -- I put a --</p> <p>7 MR. BERLIN: You did get an answer.</p> <p>8 Q. (BY MR. ANDERSON): -- double-negative in</p> <p>9 there. As a result of Abbott -- strike that.</p> <p>10 In response to Abbott receiving a</p> <p>11 pricing verification --</p> <p>12 A. Excuse me. I'm sorry.</p> <p>13 Q. -- from the pricing services like First</p> <p>14 DataBank and Red Book, Abbott didn't take any steps</p> <p>15 to stop those pricing services from publishing the</p> <p>16 increased AWPs, did it?</p> <p>17 A. No.</p> <p>18 MR. BERLIN: Object- -- I'm sorry.</p> <p>19 Objection, form. Objection scope.</p> <p>20 THE VIDEOGRAPHER: You have five</p> <p>21 minutes.</p> <p>22 MR. ANDERSON: How many?</p> <p>23 THE VIDEOGRAPHER: Five.</p> <p>24 MR. ANDERSON: We can take a break.</p> <p>25 THE VIDEOGRAPHER: Okay. We are off</p>

40 (Pages 154 to 157)

Page 158

1 the record at 1:52 p.m. This is the end of tape 3.
2 (Recess taken.)

3 THE VIDEOGRAPHER: We are back on the
4 record at 2:05 p.m. This is the beginning of tape 4.

5 Q. (BY MR. ANDERSON): All right. Mr. Fiske,
6 after any of the five WAC price increases that Abbott
7 took on the erythromycins from 1994 to the present,
8 did Abbott ever take any steps to prevent First
9 DataBank or Red Book from publishing increased AWP?

10 MR. BERLIN: Objection, form.

11 A. We don't tell the data agencies what to
12 do. We just inform them of what our WAC and our list
13 price are at the time of launch, and we report
14 changes in the WAC and list price. That's all the
15 communication that we generally have with data
16 agencies regarding pricing.

17 Q. (BY MR. ANDERSON): Subsequent to those WAC
18 price increases when Abbott was notified through
19 annual price verification forms that the AWP's had
20 also increased, did Abbott take any steps to lower
21 those AWP's or otherwise stop the publication of those
22 AWP's?

23 A. We don't set the AWP's; therefore, we would
24 have no reason to communicate that they should be
25 changed.

Page 159

1 Q. Prior to the 2001 time frame when Abbott
2 was directly reporting AWP's to the pricing services
3 in connection with increased AWP's, for instance, did
4 Abbott take any steps to make sure those AWP's did not
5 increase?

6 A. I think you misstated your question.

7 Q. For instance --

8 A. We didn't take any steps regarding the
9 setting of AWP that I recall --

10 Q. Well, prior to --

11 A. -- other than providing an estimated AWP.

12 Q. An estimated AW- -- okay. I'll -- I'll
13 include that word in the question then.

14 Prior to 2001 when Abbott was directly
15 reporting estimated AWP's to the pricing services,
16 when Abbott took a WAC price increase, did it also
17 report an increase in estimated AWP?

18 A. I believe at that time that we -- the
19 new -- we provided a new AWP at the time we provided
20 a new WAC -- an estimated AWP, if we took a WAC
21 increase.

22 Q. Right. And that new estimated AWP was
23 going up just like the WAC?

24 A. Correct.

25 Q. And Abbott expected that that AWP would be

Page 160

1 published by the pricing services to the state
2 Medicaid programs, correct?

3 A. I --

4 MR. BERLIN: Objection -- I'm sorry.
5 Objection, form. Objection, scope.

6 A. I don't know if we had an expectation of
7 what they would publish.

8 Q. (BY MR. ANDERSON): Did Abbott know that
9 state Medicaid programs obtained pricing information
10 from the data services like First DataBank and
11 Red Book?

12 A. We kn- -- we knew that state Medicaid
13 agencies had, in some cases, reimbursement formulas
14 based on AWP. Where they actually obtained their
15 data from, I don't know.

16 (Exhibit 12 marked.)

17 Q. (BY MR. ANDERSON): Mr. Fiske, take a look
18 at what's been marked as Exhibit No. 12, please.

19 A. (Reviews document.)

20 Q. For completeness, I've provided you the
21 entire e-mail chain, but I'll tell you that my
22 questions are going to be focused on the last page,
23 which is a message from Ruey Tu to several people and
24 you got a copy.

25 A. (Reviews document.) Okay. I've read it.

Page 161

1 Q. In looking at the last page of Exhibit 12,
2 do you agree that looks like an e-mail from
3 Liang-Ruey Tu to several people in PPD including
4 yourself?

5 A. I was copied on the e-mail according to
6 this. I don't know whether I recall having read it
7 in the past.

8 Q. And in the first line of the e-mail, she
9 writes, As you probably remember, we left the 00048
10 NDCs for Synthroid active in the First DataBank
11 sys- -- system since we expected potential
12 reimbursement to exist. Did I read that correctly?
13 A. Yes.

14 MR. BERLIN: It -- you read that
15 correctly. I have an objection to -- first of all,
16 Ruey would be slightly offended, but can you tell me
17 under what -- what topic this is -- this falls?

18 MR. ANDERSON: Yeah. I think it falls
19 under 2, 3, 1. It's got to do with price reporting
20 and Medicaid.

21 MR. BERLIN: But it's all limited
22 to -- I mean, this is about Synthroid, and every
23 topic is limited to the erythromycins.

24 MR. ANDERSON: Well, yeah, this is
25 referencing Synthroid, but I don't think it's limited

41 (Pages 158 to 161)

<p style="text-align: right;">Page 162</p> <p>1 to Synthroid.</p> <p>2 MR. BERLIN: Okay. Objection to</p> <p>3 form. Is there a question pending actually? I think</p> <p>4 I'll let the question be answered.</p> <p>5 There's a -- the question was whether</p> <p>6 you read it correctly, but I do have an objection to</p> <p>7 the use of this document as to the scope. Go ahead.</p> <p>8 Q. (BY MR. ANDERSON): I'm going to rephrase</p> <p>9 so we'll have a clean record.</p> <p>10 Mr. Fiske, did I read that sentence</p> <p>11 correctly?</p> <p>12 MR. BERLIN: Objection, form, scope.</p> <p>13 A. Yes.</p> <p>14 Q. (BY MR. ANDERSON): And what do you</p> <p>15 understand -- is this a man or a woman, Ruey Tu?</p> <p>16 A. It's a man.</p> <p>17 Q. Okay. What do you understand Mr. Tu to be</p> <p>18 conveying there?</p> <p>19 A. Synthroid was a product that we acquired</p> <p>20 from Knoll Pharmaceutical. When we acquired Knoll,</p> <p>21 we acquired product that was under their labeler code</p> <p>22 00048. We subsequently packaged the product in our</p> <p>23 own packaging, and it would have been under the 00074</p> <p>24 labeler code subsequent to that period of time.</p> <p>25 He is saying that we left the previous</p>	<p style="text-align: right;">Page 164</p> <p>1 there may very well be a good reason. You have to</p> <p>2 keep in mind that the erythromycin products were</p> <p>3 multisource pharmaceuticals, and often third-party</p> <p>4 payors, whether it be government agencies or others,</p> <p>5 don't reimburse based off of an AWP. They actually</p> <p>6 reimburse based on some MAC formula.</p> <p>7 Q. Uh-huh.</p> <p>8 A. That MAC may be based on AWP. It may be</p> <p>9 based on other factors.</p> <p>10 Q. Okay. And we --</p> <p>11 A. Maximum allowable cost, excuse me.</p> <p>12 Q. Yeah. And we -- we discussed that before</p> <p>13 in your deposition, so I won't delve into that too</p> <p>14 much but I'll address your comment.</p> <p>15 In situations where the drug</p> <p>16 reimbursement calculation may be lower than the MAC,</p> <p>17 do you agree that Abbott knew having published</p> <p>18 pricing in the First DataBank system enabled drug</p> <p>19 reimbursement by third-party payors to occur?</p> <p>20 MR. BERLIN: Objection, form.</p> <p>21 Objection, scope.</p> <p>22 A. I apologize. I didn't understand your</p> <p>23 question. I was -- I couldn't follow it.</p> <p>24 Q. (BY MR. ANDERSON): Okay. I'll rephrase</p> <p>25 it. In situations where a calculated drug</p>
<p style="text-align: right;">Page 163</p> <p>1 NDC labeler-coded product information out there at</p> <p>2 the various data agencies, didn't discontinue those</p> <p>3 because we knew that there was product in the</p> <p>4 marketplace that would be dispensed to patients and</p> <p>5 we wanted it to be reimbursable under the various</p> <p>6 programs, whether it be a private payor or otherwise.</p> <p>7 Q. How would having information such as drug</p> <p>8 price information published in the First DataBank</p> <p>9 system enable drug reimbursement to exist?</p> <p>10 MR. BERLIN: Objection, form.</p> <p>11 Objection, scope.</p> <p>12 A. We knew that data published by the various</p> <p>13 data agencies was used by numerous third-party</p> <p>14 payors --</p> <p>15 Q. (BY MR. ANDERSON): And --</p> <p>16 A. -- from our experience in managed care.</p> <p>17 Q. And that encompassed the erythromycins as</p> <p>18 well, correct?</p> <p>19 A. It may have.</p> <p>20 Q. There's no reason to believe that the</p> <p>21 published pricing for the erythromycins that Abbott</p> <p>22 sent to First DataBank were not also used for</p> <p>23 reimbursement purposes, as was the case for the other</p> <p>24 drugs, correct?</p> <p>25 A. Actually, there -- they may have ver- --</p>	<p style="text-align: right;">Page 165</p> <p>1 reimbursement is less than a MAC, do you agree that</p> <p>2 Abbott was aware the pricing published by First</p> <p>3 DataBank enabled third-party payors such as Medicaid</p> <p>4 to reimburse for Abbott drugs?</p> <p>5 A. Where pricing reimbursement is less than</p> <p>6 the MAC, that the AWP formula provided information</p> <p>7 for them to reimburse for the drugs?</p> <p>8 MR. BERLIN: Objection. I don't think</p> <p>9 he --</p> <p>10 A. I -- I don't know that it makes sense in my</p> <p>11 mind. I apologize.</p> <p>12 Q. (BY MR. ANDERSON): Okay. I -- I -- I'll</p> <p>13 come at it from a slightly different angle.</p> <p>14 Assuming that the drug reimbursement</p> <p>15 calculated by a given third-party payor such as a</p> <p>16 Medicaid program at AWP minus a percentage or</p> <p>17 wholesale price plus a percentage would result in a</p> <p>18 reimbursement amount less than the MAC, do you agree</p> <p>19 Abbott knew that allowing its products to continue to</p> <p>20 have their prices published in First DataBank's</p> <p>21 system would, in turn, enable third-party payors to</p> <p>22 set reimbursement for Abbott drugs?</p> <p>23 MR. BERLIN: Objection, form.</p> <p>24 Objection, scope.</p> <p>25 A. I -- I think the answer is "yes". How they</p>

42 (Pages 162 to 165)

<p style="text-align: right;">Page 166</p> <p>1 set their reimbursement, etcetera, was their business 2 practice, though. It's not something that we had any 3 influence over. 4 Q. (BY MR. ANDERSON): The very specific 5 formula you didn't influence, but the fact that the 6 pricing that was published through First DataBank, 7 for instance, was utilized, you did have an awareness 8 of? 9 MR. BERLIN: Objection, form. 10 Objection, scope. 11 A. I -- I think I communicated earlier that we 12 were aware that information public by the -- 13 published by the various pricing compendia was 14 utilized by third-party payors in their formulas. 15 Q. (BY MR. ANDERSON): Yes, sir. And so now, 16 going back to my original line of questions, to the 17 extent Abbott was raising the published WAC prices or 18 raising the published estimated AWP, then, in turn, 19 Abbott had an awareness that that information would 20 be transmitted to third-party payors such as 21 Medicaid? 22 MR. BERLIN: Objection, form. 23 Objection, scope. 24 A. The information that we reported to the 25 data agencies was our WAC and our list price. Any</p>	<p style="text-align: right;">Page 168</p> <p>1 understand that. I'll rephrase. 2 Q. (BY MR. ANDERSON): Sir, have you read 3 topic number 1 before? 4 A. I have. 5 Q. Do you understand that you've been 6 designated to testify to that topic with some 7 limitations? 8 A. Yes, I do. 9 Q. Okay. What is Abbott's understanding of 10 state Medicaid agencies' use of published prices from 11 compendias such as First DataBank? 12 MR. BERLIN: Objection, form. 13 Objection, scope. That is beyond the scope of his 14 designation. Go ahead. 15 A. A number of people I spoke with were aware 16 the state Medicaid agencies had reimbursement 17 formulas that were based upon AWP. In some cases, 18 they had other formulas that may have been based on 19 WAC pricing. Which specific data agency's 20 information they were using, we weren't privy to. 21 Q. (BY MR. ANDERSON): Were -- strike that. 22 Was Abbott aware that state Medicaid 23 agencies also utilized published WAC pricing in 24 setting drug reimbursements? 25 A. I just stated that.</p>
<p style="text-align: right;">Page 167</p> <p>1 changes to our WAC and list price, we did so in good 2 faith with the expectation that that was the 3 information we should be providing. 4 Nobody told us to do anything 5 differently than that, including Kay Morgan who 6 certainly had the opportunity because she knew what 7 our practices were. 8 So did we know that that might result 9 in the pricing compendia publishing a -- a different 10 WAC? How they use that information, how they 11 determine what an appropriate AWP for the product 12 should be was their business. That's not something 13 that we influenced. And who they sold their data to 14 we didn't influence either. 15 Q. (BY MR. ANDERSON): Okay. Now, looking at 16 topic number one, Mr. Fiske, do you understand that 17 you've been designated to testify about Abbott's 18 knowledge and understanding of the laws, practices, 19 and policies of state Medicaid agencies regarding 20 reimbursement for Abbott's drug products, including 21 Abbott's knowledge and understanding concerning state 22 Medicaid agencies' use of prices? 23 MR. BERLIN: Objection, form. It 24 misstates the designation. 25 MR. ANDERSON: Oh, well -- okay. I</p>	<p style="text-align: right;">Page 169</p> <p>1 Q. Okay. Well, I thought maybe you had, but I 2 wanted to make double-dog sure. 3 A. I did. 4 Q. So in your prior answer, you said AWP and 5 WACs? 6 A. In some cases, yes. 7 Q. Okay. Thank you. How did Abbott come to 8 that understanding? 9 A. There are a number of people at Abbott that 10 would have had occasion to know that information and 11 use that information specifically in their job. 12 For example, I told you that I spoke 13 with Dale Johnson, who is our DVP of State Government 14 Affairs, and -- I'll tell you a little story that 15 you'll find quite interesting, I'm sure -- that he 16 had conversation, for example -- their -- their -- 17 their job, by the way, was to influence state 18 legislation. That's what their -- that -- that's 19 not apparent from their title, but that's what their 20 job is, is to try and influence legislation and -- 21 and to track it and the impact that it might have on 22 Abbott Laboratories. 23 And around the 2002 time frame, 24 numerous states were implementing supplemental rebate 25 agreements with manufacturers, demanding that they</p>

43 (Pages 166 to 169)

<p style="text-align: right;">Page 170</p> <p>1 pay supplemental rebates in order for their products 2 to be reimbursable under the Medicaid program and 3 includable on a PDL, preferred drug list. 4 Dale Johnson had a con- -- a 5 conversation with an administrator from the state of 6 California specifically related to generic drug 7 reimbursement -- and it seems to me I remember 8 numbers that he even threw out there. 9 Anyway, this -- this state 10 administrator in the Medicaid program out there, Dale 11 was telling them that when they're reimbursing at AWP 12 minus seven percent, they're reimbursing at far too 13 high a level for generic pharmaceuticals; that the 14 actual acquisition price is probably much lower than 15 that. 16 The state official responded by 17 saying, "Well, we can't cut the -- the pharmacy 18 reimbursement number; they wouldn't be making enough 19 of a profit." 20 Q. When did Dale relay this conversation to 21 you? 22 A. I believe it was Monday of last week. 23 Q. Prior to Monday of last week, were you 24 aware of any communications such as that? 25 A. No.</p>	<p style="text-align: right;">Page 172</p> <p>1 misnomer. Their primary responsibility, I think I 2 explained to you earlier on was, re- -- re- -- not 3 reimbursement issues, I'm sorry, Synthroid 4 substitution issues at retail. 5 They had issues regarding Hydrocodone 6 classification as a -- a Schedule III versus a 7 Schedule II drug. It was basically to influence 8 things that might improve utilization of our 9 products. But more recently, since 2002, they're 10 involved in negotiation of state supplemental 11 rebates. 12 And of course, the individuals that 13 actually call upon the states may -- might have 14 occasion to know the actual reimbursement formulas 15 for those states, but they don't communicate them 16 generally in-house other than to the extent that if 17 we're bidding for a PDL, the state itself might 18 communicate that formula. 19 So -- you were asking do we have 20 knowledge of the state formulas. That's the extent 21 of our knowledge, I think, for the most part; not the 22 formulas, but that they used AWP as a reference point 23 because me- -- a number of the formulas reference 24 AWP. I apologize for the long answer. 25 Q. No, I understand. Other than this</p>
<p style="text-align: right;">Page 171</p> <p>1 Q. Did -- to your knowledge -- 2 A. There -- I'm sorry. 3 Q. To your knowledge, has Dale Johnson ever 4 conveyed that type of information to anybody in 5 Abbott who's responsible for setting or publishing 6 prices? 7 A. No. In -- in fact, I had a conversation 8 with him specifically did he -- did he contact 9 anybody in our department -- he had -- he had not 10 talked with me specifically, but people like Debra 11 DeYoung, who was senior manager in my group for many 12 years responsible for government programs, etcetera. 13 The people that I talked with had 14 knowledge about things that they used in the 15 performance of their job responsibilities. It wasn't 16 information that they communicated to others that 17 they didn't -- necessarily knew even had a need or 18 use for that information. 19 Another example would have been -- 20 I -- so this is going back to the question you asked 21 me earlier because I didn't finish my answer. 22 John King who was a Regional Sales 23 Manager for the Government Reimbursement -- it's the 24 GRP -- sorry, Group Reimbursement and Policy and 25 Long-Term Care Group. It's a little bit of a</p>	<p style="text-align: right;">Page 173</p> <p>1 conversation that Mr. Johnson relayed to you on 2 Monday, is there any other information that you 3 gathered about state Medicaid programs' position on 4 generic drug reimbursement? 5 A. No. 6 Q. Did you gather any information from Ginny 7 Tobiason about state Medicaid programs' drug 8 reimbursement? 9 A. No. As I explained to you, when I spoke 10 with Ginny, her title being Director of 11 Reimbursement, I thought that she would have much 12 more familiarity with the Medicaid program, but her 13 focus was on the Medicare program and Part B 14 reimbursement for Part B drugs which are primarily 15 injectables and infusion drugs -- 16 Q. Uh-huh. 17 A. -- as well as devices. 18 Q. Other than what you've described with 19 respect to Martha Schrader, did any of the Abbott 20 personnel to your knowledge review OIG reports 21 pertaining to state Medicaid drug reimbursement? 22 A. Not to my knowledge. 23 Q. Did they review any GAO, general accounting 24 office, reports pertaining to state Medicaid 25 reimbursement?</p>

44 (Pages 170 to 173)

Page 174	Page 176
<p>1 A. They may have. I don't know.</p> <p>2 Q. Do you -- strike that.</p> <p>3 Does Abbott have an understanding of</p> <p>4 state Medicaid reimbursement for drugs typically</p> <p>5 being comprised of two components; one component</p> <p>6 being drug cost reimbursement and the other component</p> <p>7 being dispensing fees?</p> <p>8 A. Yes.</p> <p>9 Q. Does Abbott have an understanding about</p> <p>10 what the regulations say concerning the drug cost</p> <p>11 reimbursement?</p> <p>12 MR. BERLIN: A- -- a- -- a- -- again,</p> <p>13 as a sort of standing objection to scope that his</p> <p>14 answers are limited to the investigation that he</p> <p>15 pursued.</p> <p>16 MR. ANDERSON: Okay.</p> <p>17 A. I -- I don't know what you're actually</p> <p>18 asking me.</p> <p>19 Q. (BY MR. ANDERSON): I'll -- I'll be a</p> <p>20 little more specific. Are -- is Abbott familiar with</p> <p>21 a concept known as estimated acquisition cost in the</p> <p>22 context of drug reimbursement?</p> <p>23 A. I've heard that term.</p> <p>24 Q. And what's your understanding of that term?</p> <p>25 A. It's the estimated acquisition cost for the</p>	<p>1 Q. (BY MR. ANDERSON): I know y'all have</p> <p>2 always reported it. I'm asking a different</p> <p>3 question.</p> <p>4 What, if any, relationship exists</p> <p>5 between the published WAC prices, the published list</p> <p>6 prices, and the published AWP prices for the</p> <p>7 erythromycin products from 1994 to the present, and</p> <p>8 the prices that pharmacies actually pay for those</p> <p>9 drugs?</p> <p>10 A. It was the acquisition cost for those</p> <p>11 pharmacies that paid WAC and list price for it.</p> <p>12 Q. Yes, sir. But I believe you've testified</p> <p>13 at length that those occasions were relatively rare,</p> <p>14 correct?</p> <p>15 A. I said that they were five to ten percent</p> <p>16 of customers that purchased at that price.</p> <p>17 Q. Right. Okay. What about for the other 90</p> <p>18 to 95 percent of the pr- -- pharmacies?</p> <p>19 A. Their acquisition price would have been</p> <p>20 whatever they paid for the product.</p> <p>21 Q. Yes, sir. In those contexts, how do the</p> <p>22 published prices on the erythromycins from 1994 to</p> <p>23 the present relate to the prices paid by the</p> <p>24 pharmacies?</p> <p>25 MR. BERLIN: Objection, form.</p>
Page 175	Page 177
<p>1 provider, meaning what did they actually pay for the</p> <p>2 product; the provider being the entity that's</p> <p>3 dispensing the product to the patient.</p> <p>4 Q. And does Abbott understand that one</p> <p>5 component of Medicaid drug reimbursement is estimated</p> <p>6 acquisition cost?</p> <p>7 A. Yes. It may be.</p> <p>8 Q. What is Abbott's understanding as to how</p> <p>9 Medicaid drug reimbursement programs go about</p> <p>10 estimating acquisition cost?</p> <p>11 MR. BERLIN: Same objection.</p> <p>12 A. It's my understanding that in some cases,</p> <p>13 states actually do surveys of retail pharmacies. In</p> <p>14 other cases, they might rely on data that's reported</p> <p>15 by data agencies.</p> <p>16 Q. (BY MR. ANDERSON): For the erythromycin</p> <p>17 products, how does the published pricing such as AWP</p> <p>18 and WAC pricing relate to the prices paid by the</p> <p>19 pharmacies?</p> <p>20 A. The price -- the WAC price and the list</p> <p>21 price are prices that are generally available in the</p> <p>22 marketplace. It's the price that we always reported</p> <p>23 to the data agencies.</p> <p>24 MR. ANDERSON: Objection,</p> <p>25 nonresponsive.</p>	<p>1 A. WAC prices are always different than</p> <p>2 contract prices.</p> <p>3 Q. (BY MR. ANDERSON): So is the answer they</p> <p>4 don't relate?</p> <p>5 MR. BERLIN: Objection, form.</p> <p>6 A. They're higher.</p> <p>7 Q. (BY MR. ANDERSON): Other than the --</p> <p>8 A. They're different.</p> <p>9 Q. Eith- -- yes, sir. Other than being</p> <p>10 higher, is there some known relationship or markup or</p> <p>11 some other way to ascertain from the published WAC</p> <p>12 price and the published AWP price for the</p> <p>13 erythromycins what most of the pharmacies are</p> <p>14 actually paying for the drugs?</p> <p>15 MR. BERLIN: Objection, form.</p> <p>16 A. No.</p> <p>17 Q. (BY MR. ANDERSON): How, if at all, would</p> <p>18 state Medicaid agencies be able to estimate the</p> <p>19 acquisition cost of pharmacies for the erythromycins</p> <p>20 based on Abbott's published WAC price or AWP price?</p> <p>21 A. They could use surveys of retail pharmacies</p> <p>22 like some of the states did.</p> <p>23 Q. (BY MR. ANDERSON): Okay. Other than</p> <p>24 surveys of pharmacy invoices, how, if at all, could</p> <p>25 state Medicaid programs estimate providers'</p>

45 (Pages 174 to 177)

<p style="text-align: right;">Page 178</p> <p>1 acquisition costs based on the published pricing?</p> <p>2 MR. BERLIN: Hold on. Objection,</p> <p>3 form, foundation.</p> <p>4 A. I can't think of another way. They -- they</p> <p>5 could have done the surveys as I suggest that other</p> <p>6 states were doing it.</p> <p>7 Q. (BY MR. ANDERSON): With respect to the --</p> <p>8 the dispensing fees, does -- what is Abbott's</p> <p>9 understanding of how state Medicaid programs</p> <p>10 calculate or ascertain dispensing fees?</p> <p>11 MR. BERLIN: Objection, form, scope.</p> <p>12 A. I don't think anybody has an understanding</p> <p>13 of how they calculate them. They're set all over the</p> <p>14 place.</p> <p>15 Q. (BY MR. ANDERSON): Does Abbott --</p> <p>16 A. They vary significantly by state, as do the</p> <p>17 reimbursement formulas for the drugs themselves.</p> <p>18 Q. Does Abbott have any understanding of --</p> <p>19 strike that.</p> <p>20 When Abbott sets any of its</p> <p>21 erythromycin prices that are published by Abbott,</p> <p>22 such as the WAC prices, does Abbott consider the</p> <p>23 adequacy of the dispensing fees paid by Medicaid</p> <p>24 programs?</p> <p>25 MR. BERLIN: Objection, form.</p>	<p style="text-align: right;">Page 180</p> <p>1 understanding of how Medicaid drug cost reimbursement</p> <p>2 relates to private insurance reimbursement?</p> <p>3 MR. BERLIN: Objection, form.</p> <p>4 Objection, scope.</p> <p>5 A. I don't know exactly when I became aware of</p> <p>6 this, but, you know, I -- I -- most of my contracting</p> <p>7 experience for many years was with managed care.</p> <p>8 We knew that some of the more</p> <p>9 restrictive or -- what else -- I guess I'll call them</p> <p>10 larger PBMs, more powerful because of their size,</p> <p>11 were reimbursing at significant discounts, discounts</p> <p>12 as deep as AWP minus 15, and I've heard of AWP minus</p> <p>13 17 reimbursement levels even.</p> <p>14 I have heard of state reimbursement</p> <p>15 levels of AWP minus five, and I've often thought it's</p> <p>16 a misuse of government funding. Clearly, managed</p> <p>17 care entities are doing a much better job of</p> <p>18 negotiating with retail pharmacy than our own</p> <p>19 government entities are.</p> <p>20 Q. (BY MR. ANDERSON): So to your knowledge,</p> <p>21 as the Abbott corporate representative, the drug cost</p> <p>22 reimbursements paid by Medicaid are typically higher</p> <p>23 than the drug cost reimbursements typically paid by</p> <p>24 private managed care insurance pro- -- reimbursers?</p> <p>25 A. Especially when you combine the two, both</p>
<p style="text-align: right;">Page 179</p> <p>1 Objection, scope.</p> <p>2 A. It's not something we even think about.</p> <p>3 Q. (BY MR. ANDERSON): How do Medicaid</p> <p>4 dispensing fees relate to private insurance</p> <p>5 dispensing fees?</p> <p>6 MR. BERLIN: Objection, form.</p> <p>7 Objection, scope.</p> <p>8 A. I don't know.</p> <p>9 Q. (BY MR. ANDERSON): Is it true that managed</p> <p>10 care or private insurance dispensing fees are</p> <p>11 typically much less than Medicaid dispensing fees?</p> <p>12 MR. BERLIN: Objection, form.</p> <p>13 Objection, scope.</p> <p>14 A. I've only heard that or read that in</p> <p>15 articles since DRA 2005 when all of the retail</p> <p>16 pharmacists were complaining about changes in</p> <p>17 potential reimbursement.</p> <p>18 Q. (BY MR. ANDERSON): And when you read that,</p> <p>19 you gained an understanding that most private</p> <p>20 insurance drug reimbursement dispensing fees are less</p> <p>21 than Medicaid dispensing fees, correct?</p> <p>22 MR. BERLIN: Objection, form.</p> <p>23 Objection, scope.</p> <p>24 A. That is correct.</p> <p>25 Q. (BY MR. ANDERSON): Did you gain an</p>	<p style="text-align: right;">Page 181</p> <p>1 the reimbursement plus the dispensing fee.</p> <p>2 Q. Right. Because the dispensing fees on the</p> <p>3 private side are actually less, and so are the drug</p> <p>4 cost reimbursements?</p> <p>5 A. Yes. But it probably goes back to the</p> <p>6 comment by the guy from California that they wanted</p> <p>7 to give the pharmacists greater profits.</p> <p>8 MR. ANDERSON: Objection,</p> <p>9 nonresponsive.</p> <p>10 Q. (BY MR. ANDERSON): Mr. Fiske, have you</p> <p>11 become aware of any Abbott personnel who stayed</p> <p>12 abreast of Medicaid regulations or requirements?</p> <p>13 A. Not for reimbursement purposes. I --</p> <p>14 people in my department kept abreast of them for</p> <p>15 government reporting purposes of AMBP and the</p> <p>16 calculations of those metrics, including myself.</p> <p>17 Q. With respect to drug reimbursement by</p> <p>18 Medicaid programs, are you aware of any individuals</p> <p>19 who -- that reviewed or otherwise considered</p> <p>20 pertinent Medicaid regulations?</p> <p>21 MR. ANDERSON: I'm sorry. Can I have</p> <p>22 that read back, please?</p> <p>23 MR. ANDERSON: I'll rephrase it.</p> <p>24 Q. (BY MR. ANDERSON): With respect to drug</p> <p>25 reimbursement, sir, are you aware of anybody at</p>

46 (Pages 178 to 181)

<p style="text-align: right;">Page 182</p> <p>1 Abbott reviewing pertinent Medicaid regulations?</p> <p>2 A. Not reviewing regulations. Martha</p> <p>3 Schrader, in -- in the performance of her job</p> <p>4 responsibilities, would monitor proposed changes to</p> <p>5 legislation, both as it affected metrics that we</p> <p>6 would calculate, pay rebates on, etcetera, and the</p> <p>7 potential financial impact to us, but she would also</p> <p>8 monitor potential changes to reimbursement formulas.</p> <p>9 Q. Is Martha based in Washington, D.C.?</p> <p>10 A. No, she's not.</p> <p>11 Q. Is -- is the group that's based in</p> <p>12 Washington, D.C. part of her chain of command?</p> <p>13 A. She has an indirect reporting relationship</p> <p>14 with -- with the VP of Government Affairs -- the</p> <p>15 Federal VP of Government Affairs.</p> <p>16 Q. Well -- and Martha is the Divisional VP for</p> <p>17 PPD?</p> <p>18 A. That is correct.</p> <p>19 Q. I see. And so she's based in --</p> <p>20 A. La- --</p> <p>21 Q. -- Abbott Park?</p> <p>22 A. Yes.</p> <p>23 Q. Okay. And, in turn, she's reporting to the</p> <p>24 same corporate leadership that the individuals based</p> <p>25 in Washington, D.C. that work for Abbott are</p>	<p style="text-align: right;">Page 184</p> <p>1 Q. (BY MR. ANDERSON): And Tom began working</p> <p>2 for her back sometime in or after 2000, correct?</p> <p>3 A. Yeah. I don't know exactly when he</p> <p>4 started, and he's been gone for about two years --</p> <p>5 Q. Okay.</p> <p>6 A. -- and there's nobody that does that today.</p> <p>7 Q. And prior to Tom's working for Martha,</p> <p>8 nobody else was doing any kind of circulation of drug</p> <p>9 reimbursement information, correct?</p> <p>10 A. I -- I wouldn't say that exactly. There --</p> <p>11 there's some people that just took it upon themselves</p> <p>12 to do some ad hoc -- if they saw something in the</p> <p>13 pink sheet, they'd -- they'd share it with others,</p> <p>14 etcetera. So I can't say that there weren't others</p> <p>15 that did that, but it was sort of people doing it on</p> <p>16 their own.</p> <p>17 Q. Why --</p> <p>18 A. It wasn't part of their job</p> <p>19 responsibilities that I'm aware of.</p> <p>20 Q. Why would Abbott personnel have taken an</p> <p>21 interest in pink sheet articles about drug</p> <p>22 reimbursement?</p> <p>23 MR. BERLIN: Objection, form.</p> <p>24 Objection, scope.</p> <p>25 Q. (BY MR. ANDERSON): I'll be more specific.</p>
<p style="text-align: right;">Page 183</p> <p>1 reporting to?</p> <p>2 A. No, I'm sorry. Martha reports to Sayed</p> <p>3 Matahari who is one of the vice presidents who</p> <p>4 reports to our division president. But she has a</p> <p>5 dotted line relationship with Elaine Leavenworth who</p> <p>6 is the -- I -- I don't know -- Corporate Vice</p> <p>7 President of Government Affairs. I -- I probably</p> <p>8 don't have the right title, but...</p> <p>9 Q. I see. Okay. So there is a connection</p> <p>10 there between Martha at the PPD level and Elaine</p> <p>11 Leavenworth who's based in Washington?</p> <p>12 A. Correct.</p> <p>13 Q. Did you learn of any efforts by Abbott</p> <p>14 personnel, including the personnel in Washington,</p> <p>15 D.C., to stay abreast of Medicaid rules,</p> <p>16 requirements, and regulations concerning drug</p> <p>17 reimbursement?</p> <p>18 MR. BERLIN: Objection, form, asked</p> <p>19 and answered.</p> <p>20 A. Only to the extent that -- as I explained,</p> <p>21 that I know that Tom Conroy who used to work for</p> <p>22 Martha Schrader monitored proposed changes in</p> <p>23 legislation, and it was part of this periodic</p> <p>24 newsletter that he would issue just informing people</p> <p>25 of potential changes.</p>	<p style="text-align: right;">Page 185</p> <p>1 Why were Abbott personnel, if at all, interested in</p> <p>2 information about Medicaid drug reimbursement?</p> <p>3 MR. BERLIN: Same objection.</p> <p>4 A. We worked in the drug industry. We're</p> <p>5 interested in things that affect the marketplace.</p> <p>6 A -- we -- many of us read articles of interest.</p> <p>7 Medicaid is -- is one of the areas of interest.</p> <p>8 There- -- there's many areas of interest.</p> <p>9 I read articles about competitors of</p> <p>10 ours that don't even have drugs that compete with</p> <p>11 ours just because I find it interesting. And -- and</p> <p>12 some of those people that find it interesting share</p> <p>13 the same information with others who may not find it</p> <p>14 so interesting.</p> <p>15 Q. (BY MR. ANDERSON): Have -- have you ever</p> <p>16 known of any Abbott personnel reviewing any OIG</p> <p>17 guidelines that have been issued about drug price</p> <p>18 reporting or drug reimbursement?</p> <p>19 MR. BERLIN: Hold on a second,</p> <p>20 please. Okay. Go ahead.</p> <p>21 A. Could you ask the question again, please?</p> <p>22 Q. (BY MR. ANDERSON): Sure. Have you become</p> <p>23 aware of any Abbott personnel reviewing guidelines</p> <p>24 issued by the Office of Inspector General regarding</p> <p>25 drug price reporting or drug reimbursement?</p>

47 (Pages 182 to 185)

Page 186

1 A. Yes.
 2 Q. What -- what have you learned in that
 3 regard?
 4 A. There are people in our legal department
 5 that do that.
 6 Q. Okay. Outside of Abbott's legal
 7 department, are you aware of any Abbott business
 8 personnel being aware of or otherwise reviewing any
 9 OIG guidelines concerning drug price reporting or
 10 drug reimbursement?
 11 A. If it's related to -- I don't know. I
 12 don't want to speculate. I'm sorry.
 13 Q. Do you know whether or not the OIG in the
 14 past four or five years issued guidelines concerning
 15 how drug manufacturers should set or report prices?
 16 A. No. Are you talking WAC and list price?
 17 Or are you talking about AMP and the reporting of
 18 AMP, MVP?
 19 Q. No. This -- it's doesn't necessar- -- no,
 20 it's not limited to AMP. It's regarding published
 21 pricing, including WACs, AWP, etcetera.
 22 Are you aware of any guidelines that
 23 have been issued that regard?
 24 A. Not that I recall.
 25 Q. Okay. Shifting now to topic number 4,

Page 187

1 Mr. Fiske.
 2 A. (Reviews document.)
 3 Q. Have -- have you prepared to testify in
 4 response to topic number 4?
 5 A. Yes, I have.
 6 MR. BERLIN: As -- as limited, right?
 7 That's your -- we've --
 8 MR. ANDERSON: Yeah, I understand --
 9 MR. BERLIN: Same -- same --
 10 MR. ANDERSON: -- y'all have placed a
 11 limitation on the designation. I'm not -- you know,
 12 throughout this deposition, I'm not wanting to argue
 13 with you about the --
 14 MR. BERLIN: No, no, I'm not wanting
 15 to argue either.
 16 MR. ANDERSON: Yeah.
 17 MR. BERLIN: It's just -- you said
 18 that in your last question.
 19 MR. ANDERSON: Oh --
 20 MR. BERLIN: So --
 21 MR. ANDERSON: -- yeah. Well -- yeah,
 22 I'm not laying a trap there. I -- you know, you have
 23 your position, I have mine. I'm -- we're not going
 24 to litigate the -- the designations, but I appreciate
 25 your point.

Page 188

1 Q. (BY MR. ANDERSON): What information were
 2 you able to gather with respect to topic number 4?
 3 A. Abbott provided information to the
 4 government since 1991 regarding average manufacture
 5 price.
 6 If there was any concern that the AWP
 7 that were reported by the pricing compendia didn't
 8 represent what providers may have been paying for the
 9 product, they had the information at hand to
 10 determine what a -- what a close approximation of
 11 that number was since AMP is, in fact, a calculation
 12 of manufacturers' sales to wholesalers and/or
 13 retailers of a -- to wholesalers for resell in the
 14 retail class of trade, net of any discounts, rebates,
 15 and any other price concessions.
 16 In addition, I think I shared with you
 17 the fact that there were -- Martha Schrader was aware
 18 of OIG reports that informed Health and Human
 19 Services -- and the states would have had access to
 20 the same information -- that AWP that were reported
 21 by the data vendors didn't represent actual
 22 acquisition costs.
 23 So I think the information was out
 24 there. Nobody asked us for anything different than
 25 that. Nobody advised us that we should be reporting

Page 189

1 something different to the data agencies.
 2 We, in fact, always acted in good
 3 faith in terms of the information that we reported to
 4 the data agencies on -- and -- and, in fact, you
 5 know, the WAC and the list prices that we developed
 6 and reported were -- were, like I said, done so in
 7 good faith with no intent to influence
 8 reimbursement.
 9 I told you that we didn't even
 10 consider reimbursement issues when we reported those
 11 products to the data agencies.
 12 Q. Did -- where did you gain that information?
 13 A. Which piece of that?
 14 Q. All -- all of it. Did -- is that based on
 15 your personal experience, or did you --
 16 A. I told you part of it was based on personal
 17 experience. Part of it was based on my conversations
 18 with Martha Schrader.
 19 Q. Right. And we discussed those earlier; you
 20 learned of those recently -- you learned of her
 21 review of an OIG report recently.
 22 Other than conversations with Martha
 23 Schrader and your own personal experience, do you
 24 have other sources for that information?
 25 A. Well, some of it -- no, that's it. Yes,

48 (Pages 186 to 189)

Page 190

1 that's it.
 2 Q. Have you any information that Abbott, from
 3 1991 until 2005, reported AMP prices for the
 4 erythromycin drugs to any state Medicaid program?
 5 A. I believe that AMPs are reported to four
 6 or -- I think it's four state Medicaid programs.
 7 Q. What do you mean by that "for"?
 8 A. Pardon me?
 9 MR. BERLIN: He -- what does he mean
 10 by the number four?
 11 A. Didn't you -- didn't you ask me what -- if
 12 we reported them, and I said I think we report them
 13 to four state Medicaid programs.
 14 Q. (BY MR. ANDERSON): Oh, "to four". I
 15 thought you said --
 16 A. I'm sorry.
 17 Q. -- for, like f-o-r.
 18 A. Oh, I'm sorry. No, to the number four --
 19 Q. Okay. When --
 20 A. -- state Medicaid agencies.
 21 Q. Whi- -- which -- which state Medicaid
 22 programs?
 23 A. Texas; Maine, I believe; Vermont, I
 24 believe. And I apologize, the last one slips my
 25 memory at this point in time.

Page 191

1 Q. And do you know when those four state
 2 Medicaid programs began receiving AMP information
 3 from Abbott?
 4 A. I don't know that number off the top of my
 5 head, but it's based on requirements from the State,
 6 so it could be easily ascertained.
 7 Q. Is it true that as a general matter, the
 8 requirements to send state Medicaid programs AMP
 9 information directly have only come about in the past
 10 four or five years?
 11 A. I -- I think that's a fair statement. But
 12 you have to keep in mind, we did report it to CMS and
 13 they could have disbursed that information to the
 14 states themselves.
 15 Q. Well, that was going to be my next
 16 question. From 1991 until sometime 2003 or so,
 17 Abbott was only reporting AMP prices for the
 18 erythromycin products to CMS, correct?
 19 A. That's correct.
 20 Q. Do you have any information to support your
 21 testimony that CMS could have shared those AMPs with
 22 the states?
 23 A. If -- if I recall, the information was
 24 supposed to be confidential and couldn't be made
 25 public, but it could be shared with the states. I --

Page 192

1 I -- I can't remember exactly where it is in the
 2 original -- whe- -- whether it's the law or the
 3 guidance, but I recall seeing this.
 4 Q. Do you, as Abbott's corporate
 5 representative, have any information or knowledge
 6 that CMS did, in fact, ever share an AMP price on the
 7 erythromycins to any state Medicaid program?
 8 A. I don't have that knowledge. I don't know
 9 if the states ever asked for it.
 10 Q. Other than the AMP information, what other
 11 information did you gather with respect to topic
 12 number 4?
 13 MR. BERLIN: Well, I -- objection,
 14 asked and answered. He -- he gave you a fairly
 15 detailed answer that went well beyond --
 16 MR. ANDERSON: Okay.
 17 MR. BERLIN: -- AMP.
 18 MR. ANDERSON: Okay. I'll try to
 19 address that.
 20 Q. (BY MR. ANDERSON): In- -- other than the
 21 AMP information that we just discussed and the
 22 discussion you had with Martha Schrader, what other
 23 information did you gather as Abbott's corporate
 24 representative with respect to topic number 4?
 25 MR. BERLIN: Still same objection.

Page 193

1 And if you want to --
 2 MR. ANDERSON: I --
 3 MR. BERLIN: Well, it's --
 4 MR. ANDERSON: All right.
 5 MR. BERLIN: -- the same -- the
 6 same -- there's an easy way to get around it, but
 7 it's the same objection. He gave a long list that
 8 you're not incorporating.
 9 A. And then -- and then I gave the other
 10 example also about Dale John's discussions with the
 11 State of California, not specifically related to
 12 Abbott's AWP's but just an A- -- a discussion in
 13 general about the fact that reimbursement rates based
 14 on the AWP did not necessarily reflect the
 15 acquisition costs by retail pharmacies for especially
 16 generic products.
 17 Q. (BY MR. ANDERSON): Did Dale mention to you
 18 that he shared that information with anyone at
 19 Abbott, other than yourself recently?
 20 A. He didn't. He didn't mention that he did.
 21 Q. Do you have any reason to believe that
 22 anyone at Abbott ever set a price for any of their
 23 erythromycin drugs based on Dale Johnson's
 24 conversation with California Medicaid?
 25 A. No reason to believe that at all.

49 (Pages 190 to 193)

Page 194	Page 196
<p>1 Q. Has -- is there any other information, sir, 2 that you gathered, other than what we just discussed 3 with respect to topic number 4? 4 A. Not that I recall. 5 Q. Okay. Now moving to topic number 5. Do 6 you understand you've been designated to testify, at 7 least in part, to topic number 5? 8 A. (Reviews document.) Yes. 9 Q. What information ha- -- did you gather on 10 behalf of Abbott in respect to topic number 5? 11 A. Nobody at Abbott could have had the 12 understanding that the U.S. government had knowledge 13 of Abbott's causing the publication of wholesale 14 prices higher than wholesale prices generally and 15 currently billed because we didn't have such a 16 practice. 17 Most of the people I talked to had no 18 knowledge of what we reported to the government. 19 None of them was aware that -- of -- of what the 20 government knew about what we were reporting, where 21 they were getting their information from, etcetera. 22 I told you that the only awareness was 23 people knew that reimbursement was based off of AWP 24 in some cases, and that's the extent of it. 25 Q. Prior to the discontinuation of base deal</p>	<p>1 A. -- misrepresentation -- 2 MR. BERLIN: Hold on. 3 A. -- of the facts. 4 MR. BERLIN: Hold -- 5 THE WITNESS: I'm sorry. 6 MR. BERLIN: Hold on -- hold on a 7 second. Sorry. Everyone wants to jump in. 8 I -- I'm going to object to form and 9 to the scope. I mean, in fairness to you, he did 10 kind of answer the original when you started to ask 11 him, so hopefully both of you will focus on what the 12 actual designation is. So -- I just leave it at 13 that. 14 A. It's a misrepresentation. First of all, we 15 didn't cause the publication of AWP's. 16 Q. (BY MR. ANDERSON): Oh, I didn't -- 17 A. We reported -- 18 Q. I'm sorry. I -- if you heard "AWPs," let 19 me interject. I -- 20 A. O- -- 21 Q. I -- 22 A. You're saying -- 23 Q. I said WAC. 24 A. Okay. And -- and we didn't cause the 25 publication of WAC prices that were not generally</p>
Page 195	Page 197
<p>1 prices in July of 2003, did any Abbott personnel have 2 any reason to believe that the government approved of 3 Abbott reporting WAC prices that were not the prices 4 typically billed wholesalers on the erythromycin 5 drugs? 6 MR. BERLIN: Objection, form. 7 A. The pricing that we reported to the pricing 8 compendia were the WAC and the list price -- the 9 published WAC and list price, the -- the WAC price 10 before any discounts to any of our customers, 11 including the wholesalers. That was our practice. 12 We always acted in good faith by doing that. Nobody 13 ever told us that we should do anything differently 14 than that. 15 MR. ANDERSON: Objection, 16 nonresponsive. 17 Q. (BY MR. ANDERSON): I appreciate your 18 testimony on that and you've testified to that a 19 couple of times, but what I'm asking is: Did Abbott 20 have any knowledge that the government approved of 21 Abbott causing WAC prices to be published for the 22 erythromycins from January of '94 up through June of 23 2003 that were not typically invoiced wholesalers? 24 A. That's a -- 25 MR. BERLIN: Hold on --</p>	<p>1 available in the marketplace. 2 The WAC price and the list price that 3 we reported to the data agencies was a price that 4 customers paid for our products. It was a price that 5 was generally available in the marketplace. There 6 was no intent to misrepresent anything. 7 Q. Mr. Fiske, I understand your testimony on 8 that, but I didn't ask about generally available. I 9 said generally paid. 10 And I think you've agreed that before 11 July of 2003, the WAC prices were not the prices 12 generally paid by wholesalers? 13 A. They were the prices that were generally 14 paid by the purchasers that -- that paid at WAC. 15 Prices that were generally paid by the purchasers 16 that purchased at base deal price were generally paid 17 at base deal price. 18 Q. Right. Well, I mean, if you look at the 19 erythromycin drugs and then, in turn, you look at the 20 class of customers known as "wholesalers," prior to 21 July of 2003, the Ery drugs were selling to the 22 wholesalers most of the time at a price that was 23 lower than WAC, right? 24 A. There were more purchases at base deal 25 prices than there were at WAC.</p>

50 (Pages 194 to 197)

Page 198	Page 200
<p>1 Q. Right.</p> <p>2 A. I'll --</p> <p>3 Q. A lot more?</p> <p>4 A. -- agree to that.</p> <p>5 MR. BERLIN: Objection, form.</p> <p>6 Q. (BY MR. ANDERSON): It was only about five</p> <p>7 or ten percent that were not, correct?</p> <p>8 A. But that was our WAC price, and that was</p> <p>9 our list price.</p> <p>10 Q. It was --</p> <p>11 A. And the price -- we were --</p> <p>12 Q. What made it your WAC price?</p> <p>13 A. "WAC" is a defined term. It is our price</p> <p>14 to wholesalers before any discounts -- without any</p> <p>15 discounts. It was our published WAC price. It was</p> <p>16 our case quantity discount price. There were</p> <p>17 customers that always paid that price. It was a</p> <p>18 price that was generally available in the</p> <p>19 marketplace. It's a real price.</p> <p>20 Q. Who defined it?</p> <p>21 A. Pardon me?</p> <p>22 Q. You said it was a defined term. Who</p> <p>23 defined it?</p> <p>24 A. It -- it's defined in Mick Kolassa's book.</p> <p>25 It's a price that everybody at Abbott understood as</p>	<p>1 opportunities for people to have seen that there are</p> <p>2 such differences.</p> <p>3 We talked about HCFA being able to see</p> <p>4 what our AMP price is relative to the AWP's that are</p> <p>5 reported by the data agencies. Nobody has told us to</p> <p>6 report anything differently than we did.</p> <p>7 We were acting in good faith reporting</p> <p>8 what we thought we should report.</p> <p>9 Q. (BY MR. ANDERSON): You know Abbott has</p> <p>10 been sued by lots of states, right?</p> <p>11 A. Being sued doesn't mean you've done</p> <p>12 anything wrong.</p> <p>13 Q. But it -- do -- you'll agree with me that</p> <p>14 it means the states aren't happy with what you're</p> <p>15 reporting, won't you?</p> <p>16 MR. BERLIN: No. I'm sorry. That's</p> <p>17 just -- I didn't mean that. That slipped out.</p> <p>18 Objection, form.</p> <p>19 A. I can't comment.</p> <p>20 Q. (BY MR. ANDERSON): What?</p> <p>21 A. I can't comment.</p> <p>22 Q. Well, no, I'm being serious. You say that</p> <p>23 nobody has ever told you to report any differently.</p> <p>24 Doesn't the fact that many states have sued Abbott</p> <p>25 indicate to you that they're not happy with the way</p>
Page 199	Page 201
<p>1 the price that we were su- -- supposed to be</p> <p>2 reporting to the data agencies.</p> <p>3 Q. Because it was, quote, "WAC"?</p> <p>4 A. Yes. And, in fact -- let's go back. I</p> <p>5 told you that -- the -- about the conversation with</p> <p>6 Kay Morgan and Mark Turon. Who would have been</p> <p>7 better prepared to inform us if we weren't reporting</p> <p>8 what we should have been than her? And she didn't</p> <p>9 tell us that we should be reporting anything</p> <p>10 different than we had.</p> <p>11 Q. Did -- would it bear upon your view of how</p> <p>12 Abbott reported its prices at all if most drug</p> <p>13 companies, when they report their prices to the</p> <p>14 compendia, actually report the WAC that's on the</p> <p>15 invoices to the wholesaler?</p> <p>16 MR. BERLIN: Objection, form.</p> <p>17 A. Without specific guidance from either the</p> <p>18 government or -- and -- and probably I'll -- I'll</p> <p>19 leave it there -- that we should be reporting</p> <p>20 something different than we are, I don't know that we</p> <p>21 would change our -- our reporting practices.</p> <p>22 We've always reported the same thing,</p> <p>23 for many, many years, for decades. Nobody has re- --</p> <p>24 told us that we re- -- should report anything</p> <p>25 different than we have. There's been many</p>	<p>1 Abbott is reporting its prices?</p> <p>2 A. It means they think there's a chance to try</p> <p>3 and get some money out of a company. That's all it</p> <p>4 means.</p> <p>5 Q. Why do you say that?</p> <p>6 A. Because that's what I believe.</p> <p>7 Q. You don't think it really has anything to</p> <p>8 do with the relative accuracy of the published prices</p> <p>9 of Abbott?</p> <p>10 A. I don't think that --</p> <p>11 MR. BERLIN: Hold on. First -- first</p> <p>12 of all, this -- this is -- I'm going to object to</p> <p>13 scope, but you can go ahead and cross-examine him on</p> <p>14 this if you want.</p> <p>15 A. I don't think it implies that there's any</p> <p>16 wrongdoing on the part of manufacturers. There may</p> <p>17 have been on the part of some, but not us. We acted</p> <p>18 in good faith when we were reporting the information</p> <p>19 that we did.</p> <p>20 Q. (BY MR. ANDERSON): You mentioned that</p> <p>21 there was a -- this definition of "WAC". Where is</p> <p>22 it?</p> <p>23 MR. BERLIN: Objection, form, asked</p> <p>24 and answered.</p> <p>25 Q. (BY MR. ANDERSON): Other than Mick</p>

51 (Pages 198 to 201)

Page 202

1 Kolassa's book.

2 A. It was also the understood definition of
3 "WAC" for as long as I've been with Abbott within
4 the Pricing Department. I do- -- I don't know about
5 it before I came to Pricing.

6 Q. Okay. Well, let's talk about, for
7 instance, Abbott's own drugs, like Biaxin, for
8 instance.

9 Will you agree that the way Abbott
10 invoiced wholesalers for the erythromycins prior to
11 July of 2003 was different than the way it invoiced
12 wholesalers for most of the PPD drugs like Biaxin?

13 MR. BERLIN: Objection, form.

14 A. No.

15 Q. (BY MR. ANDERSON): Why not?

16 A. We invoiced wholesalers for the WAC price
17 if they were not buying at the deal price, and if
18 they were buying at the deal price, they got the
19 other price.

20 Q. And it --

21 A. I told you that we had deal pricing on
22 products when they first launched into the
23 marketplace. Wholesalers were invoiced at that deal
24 pricing when the products first launched into the
25 marketplace.

Page 203

1 Q. But as it turns out, the only drugs that
2 had deal prices in place for years after years were
3 primarily the erythromycins, right?

4 A. That was a contract offer that was
5 available to them --

6 Q. Right.

7 A. -- if they took advantage of it.

8 Q. And the Erys were unique in that regard,
9 weren't they?

10 A. That was the only product that we offered
11 base deal pricing on, yes.

12 Q. And will you agree that ultimately the
13 existence of those lower wholesale invoice prices on
14 the Erys causes the way that Ery WACs were published
15 to be different than the way they were published for
16 all the other drugs?

17 MR. BERLIN: Objection, form.

18 A. No, I don't agree with that.

19 Q. (BY MR. ANDERSON): Will you agree that to
20 the extent the WAC prices that are published on all
21 the other Abbott drugs do reflect what wholesalers
22 are actually being invoiced and actually paying, but
23 they don't for the Erys because only five to ten
24 percent of the time the WAC is used, that could be
25 misleading?

Page 204

1 MR. BERLIN: Ob- -- objection, form.

2 A. The pricing that we reported to the
3 operating compendia was a price that was always
4 available and, in fact, taken advantage of.

5 Q. (BY MR. ANDERSON): Why -- why do you focus
6 on the word "available"?

7 MR. BERLIN: Objection, form.

8 A. It's a real price. We reported a real
9 price which is exactly what we thought we were
10 supposed to report, the WAC and the list price. The
11 other price was a contract price. We don't
12 reprice -- we don't report contract pricing to
13 pricing compendia. It's private information that we
14 do not want made public.

15 Q. (BY MR. ANDERSON): Is there any regulatory
16 basis or any other basis that you're aware of as
17 Abbott's corporate representative that a price merely
18 needs to be available in order for it to be
19 published?

20 MR. BERLIN: Can I -- I'm sorry. Can
21 I have that read back, please?

22 (Requested testimony read back.)

23 A. It -- the price was a real price. It was a
24 price that we sold product at. I don't understand
25 the concept that you're trying to -- I don't know

Page 205

1 what you're asking me.

2 Q. (BY MR. ANDERSON): Let me come at it this
3 way --

4 A. Our WAC pricing and our list pricing for
5 Ery was a real price. We sold product at that
6 price. We made margin -- higher margin by adding
7 that price out there in the marketplace.

8 Q. Is it important at all, with respect to the
9 publication of a price, for Abbott to consider the
10 frequency with which it's actually selling at that
11 price?

12 A. I -- I don't know that it's relevant.

13 Q. In what way would it not be relevant to the
14 relative accuracy of the pricing representation?

15 A. I'm not aware of a document that tells me
16 what I'm supposed to report. What we reported is
17 what we always re- -- have reported, and nobody has
18 told us to report anything differently.

19 So all of the questions you're asking
20 are, like, suppositions as opposed to -- or
21 speculative answers on my part, and I'm not going to
22 speculate.

23 I'm going to tell you what we reported
24 and why we reported it. We reported it because we
25 believed that that was what we were supposed to

52 (Pages 202 to 205)

Page 206

1 report, and nobody asked us for anything different
2 than that.

3 Q. Have you reviewed Mick Kolassa's definition
4 of "WAC" in the book that he published back in the
5 early '90s recently?

6 A. Probably as recently as yesterday.

7 Q. And -- and when you reviewed it yesterday,
8 can you -- can you recall literally what it says?

9 A. I -- I think it says that it is the
10 manufacturer's price to wholesalers before any
11 discounts.

12 Q. And what is --

13 A. It's not for word -- that's not verbatim,
14 but that's what it says I believe.

15 Q. And -- and -- and I'm aware also -- well,
16 I'll -- I'll leave it at that. Okay.

17 So you -- do -- as best you can
18 recall, Mick Kolassa defined it as the price to the
19 wholesaler before discounts; is that right?

20 A. Correct.

21 Q. Okay. What is it about the deal price that
22 was being invoiced by Abbott to wholesalers on the
23 erythromycins prior to July of 2003 that was
24 discounted?

25 A. You had to qualify for the deal by buying a

Page 207

1 minimum of \$500 worth of product. If you didn't
2 qualify for the deal, you would have paid the WAC
3 price. It was a discount contract price, for all
4 practical purposes.

5 Q. Was the deal prices -- were the deal prices
6 on the erythromycins to the wholesalers subject to a
7 literal written contract?

8 A. There was the --

9 MR. BERLIN: Oh -- oh -- hold -- I'm
10 sorry. Objection, form, in that it calls for a legal
11 conclusion, and in that sense, it's beyond the
12 scope. Go ahead.

13 A. There was, I'll call it, an offer letter
14 that -- that set forth what the deal was, and the
15 deal was loaded into an Abbott system. If they met
16 the qualifications, if their order totalled \$500,
17 then they would have gotten the base deal pricing.
18 If they didn't, they wouldn't have qualified for the
19 base deal pricing.

20 Q. (BY MR. ANDERSON): How did the operation
21 of those prices and the implementation of those
22 prices in the pricing system differ from the contract
23 prices that were offered by Abbott to chain drug
24 stores, for instance, or retail buying groups?

25 A. There were oth- -- there were other

Page 208

1 contracts that actually had signed contracts, but
2 there were other deals offered that did not; deals
3 that were offered, for example, when a new product
4 launched in the marketplace that were communicated
5 very similarly to the base deal pricing opportunity.

6 Q. But those deals --

7 A. It doesn't mean that it's not a contract
8 price.

9 Q. The -- the -- the -- let's take this step
10 by step. The re- -- the chains had physical written
11 Ery contracts, right?

12 A. That's correct.

13 Q. The retail buying groups had physical
14 written Ery contracts, right?

15 A. That's correct.

16 Q. Sometimes, at the launch of a product,
17 there would be a short-lived deal offered on PPD
18 drugs, correct?

19 A. That's correct.

20 Q. But those were only for a month or two?

21 A. But the contract requires performance
22 before you get that pricing, and --

23 Q. Right.

24 A. -- so it is a contract.

25 Q. Okay. And then --

Page 209

1 A. And there is consideration involved.

2 Q. Yeah, and it's --

3 A. Yeah.

4 Q. -- less than a year in term, correct?

5 MR. BERLIN: Which I'm -- objection,
6 form.

7 A. I believe the Ery deal is actually one year
8 in length.

9 Q. (BY MR. ANDERSON): Well, I know. We're
10 going to -- we're going to get to the Ery deal in a
11 second, but right -- for the -- for these other
12 drugs, these launch deals, for instance, those were
13 less than a year, correct?

14 A. A couple of weeks.

15 Q. Yeah, a couple of weeks. And -- but the
16 Ery deals, those were sometimes two years in length.
17 I've seen the deal price offers, and they're, like,
18 2001 to 2003, 2003 to 2005, for instance.

19 MR. BERLIN: Objection, form.

20 Q. (BY MR. ANDERSON): Correct?

21 A. That may be.

22 Q. Okay. But it's your testimony that the
23 fact that those were considered by Abbott to be
24 contract prices makes them a contract?

25 A. It makes it a discounted price.

53 (Pages 206 to 209)

Page 210	Page 212
<p>1 Q. And why is -- that's -- was my original 2 question. Wh- -- why is the price considered 3 discounted? 4 A. Because they have to qualify for it, and 5 it's not -- it's a lower price than our WAC price. 6 Q. You probably recall, Mr. Fiske, in your 7 prior deposition, I showed you a government 8 definition of WAC as a net price. Do you recall 9 that? 10 A. Was that in the review article, I believe? 11 Q. Yes, sir, in a HCFA spring review. 12 A. Yeah, I remember that. 13 Q. Uh-huh. 14 A. That was a -- actually not a definition 15 from HCFA at all. It was a definition from Emory 16 University. 17 Q. It was an -- it was a definition by some 18 industry experts, including a professor from Emory, 19 correct? 20 MR. BERLIN: Objection, form. 21 A. It was a definition from Emory University. 22 It was sourced -- it -- the reference was made in the 23 article. 24 Q. (BY MR. ANDERSON): That's -- right. The 25 reference in the article was to a woman named</p>	<p>1 and answered. 2 A. You know, beyond what I've already 3 discussed, no, but I -- for -- you know, Mick Kolassa 4 is regarded as an expert on the pharmaceutical 5 industry, and his elements of pricing -- 6 pharmaceutical pricing is used by many people. 7 I actually obtained the book at a 8 meeting that I attended years ago when I first came 9 to the Pricing and Contracting area to learn more 10 about pricing in general. 11 I'm sure that many people have read 12 that book, and I have to believe that Mick Kolassa, 13 having come from academia, had done adequate research 14 to know what he was talking about. 15 So I think that, in general, that is 16 what most people in the industry probably understand 17 WAC to be. 18 Q. (BY MR. ANDERSON): And do you know whether 19 or not most drug companies consider WAC to be the 20 invoice price between them and wholesalers? 21 A. I don't know what other pharmaceutical 22 companies think. 23 Q. Have you ever had any conversations with 24 Mick Kolassa about pricing terms? 25 A. No.</p>
Page 211	Page 213
<p>1 Kathleen Gondeck and a woman named Kathleen Adams, 2 and then also there was a reference to a Dr. David 3 Krailing, correct? 4 A. I don't remember. 5 Q. Oh, okay. Well, regardless of the 6 sourcing, you recall the definition? 7 A. That was a definition that was used in that 8 article. 9 MR. BERLIN: Do you recall the 10 definition specifically? Do you have the article 11 with you? 12 MR. ANDERSON: I don't. I'm -- if he 13 doesn't recall, you know, he doesn't recall. 14 MR. BERLIN: That's fine. I just want 15 us to be specific and not get into the realm of kind 16 of -- 17 A. Yeah. I'm sorry, all I -- 18 MR. BERLIN: -- philosophical -- 19 A. -- remember is a reference to wholesale 20 net. That's all I remember. 21 Q. (BY MR. ANDERSON): Have -- have you 22 undertaken any effort to ascertain what any entity 23 other than Abbott considers to be the meaning of the 24 term "WAC"? 25 MR. BERLIN: Objection, form, asked</p>	<p>1 Q. Have you ever reviewed any of his testimony 2 about the meaning of WAC? 3 A. No. 4 Q. Have you ever had any contact at all with 5 Mick Kolassa? 6 A. I think I have. I don't recall in what 7 context. I attended a seminar that he presented at. 8 Q. How recently? 9 A. Oh, my gosh. Probably in the late '90s. 10 THE VIDEOGRAPHER: You have five 11 minutes. 12 Q. (BY MR. ANDERSON): I'm now some on topic 5 13 and also on topic 8 which concerns the 14 discontinuation of deal pricing. 15 When you were deposed earlier, 16 Mr. Fiske, do you recall testifying that the deal 17 pricing was discontinued in light of government 18 investigations into drug pricing? 19 A. Yeah. I -- I actually recall that. 20 Q. Do you stand by that testimony today? 21 A. No. 22 Q. You're changing it? 23 A. You know, when I answered the question, I 24 was -- back then, I had not done as thorough an 25 investigation as I have this time.</p>

54 (Pages 210 to 213)

Page 214	Page 216
<p>1 And I had consulted with legal 2 department at the time that we discontinued the base 3 deal pricing, because it was such a big change 4 relative to what we had done for years. 5 And when we did the huge price 6 increase -- I'll call it a huge price increase for 7 this deposition -- on the Erys because 140 percent 8 of -- on the contract price is pretty significant, 9 it -- we felt it was appropriate to talk with legal. 10 I -- I think that's probably the 11 extent of what I probably should say because it's 12 probably privileged conversation. 13 Q. Did you ever -- 14 A. But I did consult with legal -- 15 Q. Yeah. Did you -- 16 A. -- regarding the base deal price. 17 MR. BERLIN: So, I mean, in that -- in 18 that sense -- list- -- his question, didn't, in 19 itself, call for attorney-client privilege 20 information, so make sure you listen to that. 21 Q. (BY MR. ANDERSON): Is it your testimony 22 today, though, that the discontinuation of base deal 23 pricing did not have anything to do with government 24 investigations into drug price reporting by drug 25 companies?</p>	<p>1 decide to do that on your own when you were reading 2 the deposition, or did you discuss the need to change 3 the testimony with another person who caused you to 4 decide to change it? 5 MR. BERLIN: Well -- wait. Hold on. 6 What do you mean by "change the testimony"? I mean, 7 the topic is -- you asked him a question. He didn't 8 come in here and say, "I want to revise something 9 that I said earlier". 10 You asked him a question about the 11 investigation he did about termination of base deal 12 price, and he gave you the result of his 13 investigation. 14 MR. ANDERSON: No, I -- what -- we've 15 highlighted the specific testimony about -- 16 MR. BERLIN: And he's now said it's 17 inaccurate. But I don't understand what you -- 18 you're sort of saying that he's come in here and 19 changed testimony, where he had the testimony which 20 was based on his individual knowledge in the earlier 21 defi- -- deposition. 22 You've now come in and specifically 23 designated him on a topic. He investigated it and 24 learned that his in- -- individual knowledge was 25 inaccurate, and he said it's inaccurate, and you're</p>
Page 215	Page 217
<p>1 A. I don't believe it did. 2 Q. And you agree that that testimony today is 3 different than the testimony you provided previously? 4 A. I agree with that. 5 Q. Did you decide to change that testimony, or 6 did you discuss that change with others? 7 A. I -- 8 MR. BERLIN: Let me object to the form 9 of that, although, I don't -- I think that the answer 10 doesn't -- if you think the answer calls for 11 attorney-client privilege information, we should step 12 out, but I -- I don't know that it does. 13 A. I -- when I read the deposition, I actually 14 realized that I had made a misstatement of fact 15 because I had already done some of the fact-finding 16 for th- -- for this deposition. 17 And, you know, many of us say things 18 in depositions thinking that we're stating the facts, 19 and that was a misstatement of fact on my part. It 20 was not an error, so... 21 MR. ANDERSON: Objection, 22 nonresponsive. 23 Q. (BY MR. ANDERSON): I appreciate that, 24 but -- and I understood that from your prior 25 testimony, but I'm now asking you, sir: Did you</p>	<p>1 asking whose decision was that to -- for you to 2 testify. 3 That's -- that's your decision. I 4 mean, you -- you designated him on the topic. He 5 investigated it and has come in and told you the 6 result of his investigation. 7 MR. ANDERSON: I -- I don't want to 8 argue with you. I don't even understand why there's 9 a problem. I'm just trying to get to the root source 10 of the change. 11 Q. (BY MR. ANDERSON): Mr. Fiske, I re- -- 12 appreciate that you read your deposition recently. 13 Did you decide solely to change that testimony, or 14 did you receive some instruction or suggestion from 15 someone else to change the testimony? 16 A. I noted that I made the error myself, and I 17 decided to testify what the facts were today. I did 18 inform counsel that I had made an error in my 19 previous testimony. 20 Q. Did you discuss at any time changes in drug 21 pricing that were contemplated by HPD personnel? 22 A. I'm sorry? 23 Q. Did you discuss at any time changes in 24 pricing that were contemplate- -- published pricing 25 that were contemplated by HPD personnel?</p>

55 (Pages 214 to 217)

<p style="text-align: right;">Page 218</p> <p>1 MR. BERLIN: Objection to form. 2 Objection to scope. And objection because I do think 3 that the answer -- or the question potentially calls 4 for attorney-client information. 5 So you may answer the question without 6 disclosing if, in fact, there is any communications 7 with an attorney on that. 8 A. In preparation for this deposition? 9 Q. (BY MR. ANDERSON): Well, no, I'm not 10 limiting it to preparation for this deposition. 11 A. I was aware that at some point in time HPD 12 did some repricing of products. That's about the 13 extent of what my knowledge is. 14 Q. And did you discuss -- how did you gain 15 that awareness? 16 MR. BERLIN: And -- objection to 17 form. Objection to scope. And objection to the 18 extent that the question calls for communi- -- 19 privileged communications with counsel. I'm 20 instructing you not to answer with respect to those. 21 A. I think I first became aware when Debbie 22 DeYoung told me that that was going to occur -- or 23 had happened. I don't know which it was. 24 Q. (BY MR. ANDERSON): Do you know a gentleman 25 by the name of Mike Sellers?</p>	<p style="text-align: right;">Page 220</p> <p>1 A. Correct. 2 Q. And -- and you don't recall any; is that 3 right? 4 A. I don't recall any, no. 5 (Exhibit 13 marked.) 6 Q. (BY MR. ANDERSON): If you could, take a 7 look at what's been marked as Exhibit 13. 8 A. (Reviews document.) 9 Q. Do you see your name noted on Exhibit 13? 10 A. I do. 11 Q. And it's in the context of a statement that 12 reads, "Fiske to evaluate volume risk with AWP drop 13 2/22/01," correct? 14 A. I see that, yes. 15 Q. Does that refresh your memory at all about 16 any conversations you may have had with Mike Sellers 17 back in February of '01? 18 A. It doesn't. I don't know why we would have 19 a discussion regarding Ery-Ped and EES suspension. 20 They had nothing to do with those products that I'm 21 aware of. 22 And I actually didn't have very many 23 conversations with Mike Sellers over my career, other 24 than when we actually integrated -- when -- when HPD 25 was spun off and we took some of the products into</p>
<p style="text-align: right;">Page 219</p> <p>1 A. I knew Mike. 2 Q. Did you discuss at any time changes in 3 published pricing there were contemplated by Abbott 4 with Mike Sellers? 5 A. No. 6 MR. BERLIN: Before -- 7 A. Not that I recall. 8 MR. BERLIN: Before you mark another 9 document -- 10 MR. ANDERSON: Uh-huh. 11 MR. BERLIN: -- I just want to remind 12 you that you're -- 13 MR. ANDERSON: Okay. Well, let's take 14 a break now, because this is going to be a line of 15 questions. 16 THE VIDEOGRAPHER: We are off the 17 record at 3:24 p.m. This is the end of tape 4. 18 (Recess taken.) 19 THE VIDEOGRAPHER: We are back on the 20 record. It is 3:42 p.m. This is the beginning of 21 tape 5. 22 Q. (BY MR. ANDERSON): Before the break, 23 Mr. Fiske, I had asked you about any conversations 24 you had had with Mike Sellers regarding published 25 price changes, correct?</p>	<p style="text-align: right;">Page 221</p> <p>1 PPD. That would have been in the 2004 time frame. 2 (Exhibit 14 marked.) 3 Q. (BY MR. ANDERSON): Just hold that for a 4 moment, and take look at what's been marked as Fiske 5 Exhibit 14. It's also been previously marked as 6 Exhibit 1144. 7 A. (Reviews document.) 8 Q. In looking at Exhibit 14, will you agree 9 that the cover page appears to be a memo from Mike 10 Sellers to Meeting Attendees dated March 7th, 2001? 11 A. Yes. 12 Q. So just a few days, apparently, after his 13 note marked as Exhibit 13? 14 A. (Reviews document.) Okay, yes. 15 Q. And then if you look at the third page of 16 Exhibit 14, under a section at the top titled "Policy 17 Implementation," do you see a section there that 18 reads, quote, "Discussed price adjustment with other 19 Divisions: PPD - Standard WAC prices at five percent 20 below List; potential exposure on Ery products which 21 are sold at 40 to 60 percent below List; some sales 22 volume risk with lower List price". Did I read that 23 correctly? 24 A. That's what this document says. 25 Q. Now, looking back at Exhibit 13, do you see</p>

56 (Pages 218 to 221)

Page 222	Page 224
<p>1 that reference that I pointed out earlier about the 2 note that you were to evaluate volume risk with AWP 3 drop? 4 A. I know what -- I know that's what the 5 document says, sir. I don't recall any of this. 6 Q. Do either of these documents refresh your 7 memory in any way about any evaluation you made with 8 respect to sales volume drops on the Erys? 9 A. No. 10 Q. Do you have any explanation for why this 11 information was contained in these two exhibits? 12 A. I don't know. I don't recall. If I did, 13 I'd tell you. I don't recall. I don't recall any of 14 this, and I have pretty good memory once things are 15 put in front of me, but I don't recall. 16 Q. There's not another person with the last 17 name "Fiske" at Abbott PPD, is there? 18 A. No. There's a -- a Teresa Fiske, but I 19 don't even know where she works. 20 Q. Okay. She's at Abbott, but big Abbott in 21 some other division? 22 A. I don't even know her. Not a relative or 23 anything. 24 Q. Right. Is it true that back in the early 25 2001 time frame some Ery products were sold at</p>	<p>1 divisions were under investigation or had paid 2 settlements with respect to drug pricing, did -- did 3 you or anyone else at PPD ever consider lowering the 4 published pricing for the Erys? 5 MR. BERLIN: Objection, form. 6 Objection, scope. 7 A. I'd like to talk with my attorney regarding 8 a privilege, if I could. 9 MR. BERLIN: We can. We must. 10 THE VIDEOGRAPHER: We are off the 11 record at 3:50 p.m. 12 (Recess taken.) 13 THE VIDEOGRAPHER: We are back on the 14 record at 3:53 p.m. 15 MR. BERLIN: Can you read back the 16 question, please? 17 (Requested testimony read back.) 18 MR. BERLIN: You can answer that 19 question. 20 A. I'm not sure that that was a 21 consideration. I think that the fact that they were 22 being investigated, that it made me question whether 23 we had any issues in PPD that we might be faced with. 24 Q. (BY MR. ANDERSON): And what did you 25 determine outside of what you learned from your</p>
Page 223	Page 225
<p>1 roughly 40 to 60 percent below list price? 2 A. (Reviews document.) Our contract pricing 3 was that low. 4 Q. It -- 5 A. Even our base deal pricing, you saw in that 6 one document, there were products that were as deep 7 as a 60-percent discount below WAC, not list. 8 Q. And WAC was just five percent lower than 9 list, correct? 10 A. That's correct. 11 Q. Have you ever undertaken any evaluation of 12 sales decreases or sales volume risks of -- 13 associated with changes in list prices or AWP prices? 14 A. Not that I recall. 15 Q. Has anyone to your knowledge evaluated any 16 sales decreases or sales volume risk in relation to 17 changes in list prices or AWP prices at PPD? 18 A. Not that I recall. 19 Q. Did you appreciate that Abbott divisions 20 such as TAP and HPD were under government 21 investigation for drug pricing issues prior to 22 Jan- -- pardon me, July of 2003? 23 MR. BERLIN: Objection, scope. 24 A. Yes. 25 Q. (BY MR. ANDERSON): Because other Abbott</p>	<p>1 lawyers? 2 MR. BERLIN: Okay. Well, that is -- 3 we do object to that based on the attorney-client 4 privilege and potentially work product doctrine 5 issues as well, and I'm going to instruct you not to 6 answer that question. I don't think it's answerable 7 without disclosing attorney-client privilege. 8 MR. ANDERSON: Well, I don't know 9 about the attorney-client, but I'll address the work 10 product. 11 Q. (BY MR. ANDERSON): Other than information 12 you learned as a result of work you did at the 13 direction of attorneys, and other than information 14 you learned in communications with attorneys, what 15 did you learn with respect to whether or not PPD 16 should lower any published prices? 17 MR. BERLIN: You can an- -- I mean, 18 I -- I don't know whether you did learn anything 19 beyond what you -- 20 A. They were all privileged conversations. 21 There- -- there's nothing I learned that was outside 22 of a discussion with an attorney. 23 Q. (BY MR. ANDERSON): Outside of discussion 24 with an attorney or something you learned at the 25 direction of an attorney, do you have any</p>

57 (Pages 222 to 225)

Page 226	Page 228
<p>1 understanding of why HPD, in roughly May of 2001, 2 would have caused the publication of lower published 3 prices for its drugs and, yet, PPD would not have 4 caused the same lower prices to be published for the 5 erythromycins? 6 MR. BERLIN: Objection to form. 7 Objection to scope. And to the extent there is 8 anything that's not covered by the attorney-client 9 privilege -- in other words, not wi- -- in terms of 10 what he said, not arising from your communications 11 with attorneys, you can answer it. 12 A. I don't think that I can answer the 13 question. I think it was all privileged 14 communication. 15 Q. (BY MR. ANDERSON): Is there any 16 consideration today to lower the published prices on 17 any of the erythromycin products? 18 A. No. 19 (Exhibit 15 marked.) 20 Q. (BY MR. ANDERSON): I'm now going to be 21 asking you some more questions about WAC and industry 22 practice with respect to WAC. If you could, take a 23 look at what's been marked as Exhibit 15. 24 A. (Reviews document.) 25 Q. And primarily, Mr. Fiske, I'm going to</p>	<p>1 A. I read this relatively quickly. This is 2 not a document that I've seen in the past. It 3 appears to be a document that may have been created 4 with respect to the Hospital Products Division and 5 what their interpretation of certain things were, 6 which may not have been consistent with PPD. 7 You know, it's almost like two 8 different companies sometimes. I know that maybe 9 people don't see it that way, but that's the way 10 it's -- often operates. 11 Q. (BY MR. ANDERSON): Okay. Looking at that 12 definition of WAC, would you say that that definition 13 is different than PPD's definition of WAC? 14 A. I don't know that it's all that much 15 different. It doesn't carry the provision in it that 16 it's the undiscounted price to a drug wholesaler. I 17 told you what the PPD definition of WAC was that we 18 used. 19 Q. Do you agree that for PPD products, WAC is 20 normally the starting point from which chargebacks 21 are processed? 22 A. Yes. 23 Q. And do you agree that with respect to the 24 erythromycin products prior to July of 2003, that 25 roughly 90 to 95 percent of the time, deal price was</p>
Page 227	Page 229
<p>1 focus your attention on the terms that are defined on 2 the second page of Exhibit 15. 3 A. (Reviews document.) Yes. 4 Q. Do you see the second page of Exhibit 15 up 5 at the top has a date and time stamp of June 14th, 6 '01, 5:36 p.m.? 7 A. I see that, yes. 8 Q. And then there's some terms that are 9 defined, correct? 10 A. Yes. 11 Q. And the definition for WAC reads, "The 12 price of a product when sold to a drug wholesaler and 13 eligible for chargeback processing after the end sale 14 to a healthcare provider." Did I read that 15 correctly? 16 MR. BERLIN: It -- let me just 17 instruct you that even though his questions relate 18 just to the particular terms, you are welcome, if you 19 want to, to read the whole document. It's not -- 20 I -- if it were, like, a 20-page document, we might 21 have a different discussion, but I don't think it 22 will take you very long to -- 23 A. I -- 24 MR. BERLIN: -- flip through it and 25 put it in context.</p>	<p>1 the starting point for the processing of chargebacks? 2 MR. BERLIN: Objection, form. 3 A. To do otherwise, we would have been paying 4 the wholesaler -- or reimbursing the wholesaler at 5 too high a level. 6 Q. (BY MR. ANDERSON): I understand, 7 Mr. Fiske. So the answer to my question is "yes"? 8 A. Yes. 9 Q. You- -- you've lived in Chicago or the 10 Chicago area for many years, right? 11 A. Most of my life. 12 Q. Yeah. Do you subscribe to the Chicago 13 Tribune? 14 A. I do. 15 (Exhibit 16 marked.) 16 Q. (BY MR. ANDERSON): I'll show you a copy of 17 a Chicago Tribune article that's marked as Exhibit 18 16. 19 A. (Reviews document.) 20 Q. Do you recall this article, sir? 21 A. I don't know whether I've seen it or not. 22 I may have. It doesn't -- 23 Q. Do you recall the basic circumstances that 24 are described in the article? 25 A. I remember that the Hospital Products</p>

58 (Pages 226 to 229)

Page 230	Page 232
<p>1 Division adjusted some of their prices.</p> <p>2 Q. Looking at the very first paragraph of the</p> <p>3 article dated June 14th, 2001, it reads, "Abbott</p> <p>4 Laboratories has quietly lowered prices on dozens of</p> <p>5 drugs and medical treatments amid multiple state and</p> <p>6 federal investigations alleging that U.S. drug</p> <p>7 companies lied to the government about the wholesale</p> <p>8 prices of certain pharmaceuticals." Did I read that</p> <p>9 correctly?</p> <p>10 A. That's what the article says.</p> <p>11 Q. Is -- is this about the same time frame</p> <p>12 when you became aware of ongoing investigations into</p> <p>13 Abbott's drug pricing?</p> <p>14 A. I believe so.</p> <p>15 Q. Does that paragraph indicate to you that</p> <p>16 the government was okay with how the prices were</p> <p>17 being published?</p> <p>18 MR. BERLIN: Objection, form.</p> <p>19 Objection, scope.</p> <p>20 A. It says that there were allegations that</p> <p>21 certain drug companies had misrepresented</p> <p>22 information.</p> <p>23 Q. (BY MR. ANDERSON): Does the fact that the</p> <p>24 government had made allegations about drug companies</p> <p>25 lying to the government about wholesale prices</p>	<p>1 was a settlement.</p> <p>2 Q. You mentioned earlier in your testimony</p> <p>3 that Debbie DeYoung had notified you about some</p> <p>4 pricing changes on Abbott products in other</p> <p>5 divisions; is that correct?</p> <p>6 A. I believe that's how I first became aware</p> <p>7 that there was some repricing that would be done by</p> <p>8 the Hospital Products Division.</p> <p>9 Q. And what did she convey to you about that?</p> <p>10 MR. BERLIN: Objection, scope.</p> <p>11 A. I don't recall exactly other than the fact</p> <p>12 that -- that they were repricing a number of their</p> <p>13 products because there were very few sales at the</p> <p>14 actual WAC price that they had published.</p> <p>15 Q. (BY MR. ANDERSON): And did that cause you</p> <p>16 to consider the relative infrequency at which the</p> <p>17 Erys were being sold at WAC?</p> <p>18 A. I -- I told you that when I heard about</p> <p>19 these investigations in my earlier testimony, that it</p> <p>20 made me question whether we had any issues that we</p> <p>21 needed to be concerned about in PPD.</p> <p>22 Q. Including the published pricing of the</p> <p>23 Erys?</p> <p>24 MR. BERLIN: Objection, form.</p> <p>25 A. The Ery base deal pricing was one of the</p>
Page 231	Page 233
<p>1 indicate to you the government approved of the ways</p> <p>2 those drug companies were reporting prices?</p> <p>3 MR. BERLIN: Objection, form.</p> <p>4 A. It would imply that they did not.</p> <p>5 Q. (BY MR. ANDERSON): Looking at the second</p> <p>6 page of Exhibit 16, does -- the second full paragraph</p> <p>7 discusses TAP Pharmaceuticals. Do you see that?</p> <p>8 A. Yes.</p> <p>9 Q. And there's a reference there to the</p> <p>10 negotiation of a settlement that could top \$800</p> <p>11 million?</p> <p>12 A. Yes.</p> <p>13 Q. Are you aware that TAP is a joint venture</p> <p>14 between Takada and Abbott?</p> <p>15 A. It was at that time.</p> <p>16 Q. And are you aware that at that time --</p> <p>17 strike that.</p> <p>18 Were you aware back in 2001 that TAP</p> <p>19 was also under -- under investigation?</p> <p>20 A. Yes, I was.</p> <p>21 Q. And are you aware that ultimately TAP did</p> <p>22 pay a settlement that exceeded \$800 million to the</p> <p>23 government?</p> <p>24 A. I don't recall the exact amount of the</p> <p>25 settlement. I was agree-- I am aware that there</p>	<p>1 issues that I thought that we should check into.</p> <p>2 Q. (BY MR. ANDERSON): Did you ever gain an</p> <p>3 understanding of -- of what the frequency was at HPD</p> <p>4 for sales at the published WAC for the HPD generics</p> <p>5 and how that compared with the frequency at which the</p> <p>6 erythromycins were sold at WAC prior to July of 2003?</p> <p>7 A. I think those were privileged discussions.</p> <p>8 Q. Okay. I'll -- I'll frame the question</p> <p>9 differently and determine if you have any information</p> <p>10 that's nonprivileged.</p> <p>11 Other than information you learned</p> <p>12 from attorneys, or information you learned because</p> <p>13 you conducted work at the direction of attorneys, did</p> <p>14 you ever gain an understanding of the relative</p> <p>15 infrequency at which the HPD generics were actually</p> <p>16 sold at the published WAC and compare that to the</p> <p>17 infrequency with which the erythromycins at PPD were</p> <p>18 actually sold at the published WAC prior to July of</p> <p>19 2003?</p> <p>20 A. I don't believe so.</p> <p>21 Q. Outside of privileged communications with</p> <p>22 lawyers, do you have any understanding of why PPD has</p> <p>23 kept the published prices on the erythromycins high,</p> <p>24 if not higher than they were in 2001, whereas, HPD</p> <p>25 caused the published prices to be dramatically</p>

59 (Pages 230 to 233)

Page 234	Page 236
<p>1 decreased?</p> <p>2 MR. BERLIN: Objection, form.</p> <p>3 A. Our WAC and list price have always been</p> <p>4 real prices in the marketplace that purchasers paid</p> <p>5 for the product. And, in fact, the number of</p> <p>6 purchases at WAC and list price have actually</p> <p>7 increased over time.</p> <p>8 Q. (BY MR. ANDERSON): What was not real about</p> <p>9 the WACs for the HPD generics?</p> <p>10 A. I'm not --</p> <p>11 MR. BERLIN: Objection, form. That</p> <p>12 misstates char- -- testimony.</p> <p>13 A. I didn't say that theirs weren't. I said</p> <p>14 that ours were actual prices available in the</p> <p>15 marketplace.</p> <p>16 I don't know many facts about the HPD</p> <p>17 situation at all. I'm not somebody that can testify</p> <p>18 upon those facts.</p> <p>19 Q. (BY MR. ANDERSON): Is there -- you</p> <p>20 mentioned the word "available" again. Is there</p> <p>21 something about -- well, strike that.</p> <p>22 Where did you gain an understanding</p> <p>23 that the -- the kind of governing rule for a</p> <p>24 published price was whether or not it was available?</p> <p>25 MR. BERLIN: Objection, assumes facts</p>	<p>1 MR. BERLIN: Objection, form.</p> <p>2 A. We had a number of marketplace prices for</p> <p>3 our product; our WAC price, our list price, our base</p> <p>4 deal price, our contract price.</p> <p>5 Q. (BY MR. ANDERSON): All right. I'll --</p> <p>6 I'll limit it, then, by the different markets. Do</p> <p>7 you agree, sir --</p> <p>8 A. I'm sorry. Excuse me.</p> <p>9 Q. That's fine. And if you need a drink of</p> <p>10 water, that's fine.</p> <p>11 A. No, I'm fine.</p> <p>12 Q. Okay. Would you agree, sir, that for</p> <p>13 instance, with respect to the wholesaler class of</p> <p>14 trade, that a published WAC is going to be more</p> <p>15 representative of the actual transactions between</p> <p>16 Abbott and a wholesaler if it's frequently the price</p> <p>17 paid by the wholesaler?</p> <p>18 MR. BERLIN: Objection, form.</p> <p>19 A. I don't -- I don't know that. That's</p> <p>20 debatable. The -- the WAC price that we have out</p> <p>21 there is a price that customers paid for the product,</p> <p>22 including wholesalers. It was a real price.</p> <p>23 Q. (BY MR. ANDERSON): I understand your</p> <p>24 testimony on that point, sir. What I'm trying to do</p> <p>25 is ascertain if there's any way to measure when a</p>
Page 235	Page 237
<p>1 not in evidence.</p> <p>2 A. Maybe "available" is the wrong term. It is</p> <p>3 a price that people purchase the product at. The</p> <p>4 reason I say it was available is -- it's because it</p> <p>5 was a price that was offered to customers.</p> <p>6 Customers who chose not -- or -- or --</p> <p>7 or -- chose not to participate in our base deal</p> <p>8 pricing program purchased in less than full case</p> <p>9 quantities in the case of the list price.</p> <p>10 So when I say "available," it was a</p> <p>11 price that was out there, and certain customers</p> <p>12 purchased at that price.</p> <p>13 Q. (BY MR. ANDERSON): Is there any threshold</p> <p>14 requirement that you're aware of at Abbott that a</p> <p>15 price actually be paid with any type of frequency by</p> <p>16 customers in order to be published or otherwise</p> <p>17 justify the publication of that price?</p> <p>18 MR. BERLIN: Objection, form, asked</p> <p>19 and answered.</p> <p>20 A. I'm not aware of any such threshold.</p> <p>21 Q. (BY MR. ANDERSON): Would you agree that to</p> <p>22 the extent a published price is frequently actually</p> <p>23 paid by a customer, that would make that published</p> <p>24 price more representative of the marketplace pricing</p> <p>25 of the product?</p>	<p>1 price becomes real, what frequency -- with what</p> <p>2 frequency does the price actually have to be paid by</p> <p>3 somebody in order for it to be considered real in</p> <p>4 Abbott's view?</p> <p>5 MR. BERLIN: Objection, form, assumes</p> <p>6 facts not in evidence.</p> <p>7 A. I don't know how to answer your question</p> <p>8 than the way I've answered this and other questions,</p> <p>9 and that is, I don't know -- I don't know that</p> <p>10 there's a frequency, but if it's a contract price, as</p> <p>11 opposed to our undiscounted WAC price, then that</p> <p>12 wouldn't be a price that we would report.</p> <p>13 Q. (BY MR. ANDERSON): Okay. I'm going to</p> <p>14 come at it at a slightly different angle.</p> <p>15 Hypothetically, if the PPD products that are at issue</p> <p>16 in this case, the erythromycins, were only sold at</p> <p>17 WAC one percent of the time and the other 99 percent</p> <p>18 of the time they were sold at deal price, would one</p> <p>19 percent still be enough to justify the publication of</p> <p>20 that WAC?</p> <p>21 A. I don't know the answer to that question.</p> <p>22 It requires speculation. I don't know. That's not</p> <p>23 the case.</p> <p>24 Q. Would four percent be enough?</p> <p>25 A. I don't know the answer to that.</p>

60 (Pages 234 to 237)

Page 238

1 Q. But it is your testimony that somewhere
2 between five and ten percent is enough?

3 MR. BERLIN: Objection, form.
4 Misstates testimony.

5 A. I'm telling you that there are sales at WAC
6 and list price five to ten percent of the time. We
7 report the WAC and the list price to the compendia
8 because that's what we believe we're supposed to be
9 reporting to the compendia. Nobody has told us any
10 differently than that. We've done so in good faith.

11 Q. (BY MR. ANDERSON): Well, back before July
12 of 2003, how would anyone outside of Abbott know to
13 correct Abbott and say, "Hey, you're only selling
14 these erythromycins about five to ten percent of the
15 time at WAC, you need to change the way you're
16 publishing these WACs"?

17 A. Mr. Anderson, what was the date that you
18 mentioned? Prior to when?

19 Q. July 2003.

20 A. I -- I testified earlier, you know, HCFA
21 knew that the AWP for the products were
22 significantly more than the AMPs that we were
23 reporting.

24 Q. What do you base that on?

25 A. Because I sent the AMPs to HCFA on a -- a

Page 239

1 monthly basis beginning in 1991 -- I'm sorry,
2 quarterly basis beginning in 1991 under the Medicaid
3 rebate program.

4 So the government can't say that they
5 didn't know that there was a difference between the
6 AWP and the average manufacture price that we were
7 actually selling those products for. We were
8 reporting that number.

9 Where they were getting the AWP from,
10 I don't know which data agency they may have obtained
11 it from, but they could have seen that there was a
12 difference. They could have asked us if they thought
13 that there was something wrong.

14 Q. Did Abbott make any disclosures to any
15 state Medicaid program about the discrepancies
16 between its AWP and its AMPs?

17 MR. BERLIN: Objection, form.
18 Objection to the term "discrepancy".

19 A. Did we?

20 Q. (BY MR. ANDERSON): Yes, sir.

21 A. No. Other than the states -- once we were
22 required to report AMPs, the -- the four states that
23 we had to report them to.

24 Q. The four states in the past three or four
25 years or so?

Page 240

1 A. It may have been longer with Texas, but
2 yeah, that's right.

3 Q. Now I'm shifting, Mr. Fiske, to topic
4 number 6. I'll ask some foundational questions
5 first. Did Abbott publish direct or list prices for
6 the erythromycins?

7 A. We communicated a WAC and a list price.

8 Q. And -- and generally, the -- the list price
9 was simply five percent higher than the WAC price,
10 correct?

11 A. Correct.

12 Q. And was the list price set off of the WAC
13 or vice versa?

14 A. WAC was established and divided by .95 to
15 arrive at the list price.

16 Q. Okay. And, likewise, WAC was the starting
17 point for the calculation of the estimated AWP by
18 Abbott, correct?

19 A. Yes.

20 Q. With respect to topic number 6, did you
21 gather any information in preparing to testify?

22 MR. BERLIN: Make sure you're --
23 the -- the designation goes on to the second page of
24 what you have.

25 A. (Reviews document.) The individuals I

Page 241

1 spoke with had no knowledge regarding this topic
2 whatsoever.

3 People within the Pricing and
4 Contracting Department, including myself and Ronny
5 Lancaster, who is our Senior Manager for Government
6 Pricing, replaced Debbie DeYoung, are aware of the
7 fact that we have reported AMPs to the government
8 since 1991 and that -- you know, that this whole
9 thing, the way it's worded, is -- it sort of
10 misrepresents the facts.

11 We didn't cause publication of direct
12 or list prices that were higher than the prices
13 generally paid because we had a WAC and a list price
14 that was generally paid by purchasers at all times,
15 as was a base deal price generally paid by other
16 customers, as was a contract price, as I said before,
17 generally paid by the customers that purchased that
18 contract price. So --

19 MR. BERLIN: I think we need to -- I
20 think he may have misspoken, and I need to talk to
21 him to get him to clarify that now.

22 MR. ANDERSON: Well, I -- I'd like to
23 follow up on that. I may clarify it now.

24 MR. BERLIN: Well -- well, no. I
25 think that he -- he said that no one he spoke to

61 (Pages 238 to 241)

<p style="text-align: right;">Page 242</p> <p>1 about a certain thing, and I happen to know from my 2 prior discussions with him that that's not accurate. 3 So -- 4 MR. ANDERSON: Oh, okay. Well, yeah, 5 if you need to talk to him, then go ahead. 6 MR. BERLIN: And that's why I waited 7 for him to finish -- 8 THE VIDEOGRAPHER: We are off the 9 record at 4:22 p.m. 10 (Off the record.) 11 THE VIDEOGRAPHER: We are back on the 12 record at 4:23 p.m. 13 A. Eric reminded me that when I spoke with 14 Martha that she told me about the OIG reports that 15 showed that the government was aware that AWP's did 16 not reflect the actual acquisition costs by retail 17 pharmacies for various products. 18 Q. (BY MR. ANDERSON): And that's -- that's no 19 different than the information you conveyed earlier 20 this morning about your conversation with Martha, 21 correct? 22 A. That's true. 23 Q. And you haven't been able to gain any 24 copies of those documents or any other information 25 other than what you conveyed today?</p>	<p style="text-align: right;">Page 244</p> <p>1 recall. 2 Q. (BY MR. ANDERSON): You -- in your prior 3 answer, Mr. Fiske, you mentioned that the list prices 4 and the WAC prices were generally paid. Do you 5 recall that a few moments ago? 6 A. By the purchasers who purchased at WAC 7 price and list price, those were the -- not only 8 generally paid, they were the prices they paid. 9 Q. Well, I understand that, but the request in 10 6 isn't limited to causing the publication of direct 11 or list prices that were higher than prices generally 12 and currently paid by purchasers buying at direct and 13 list prices. 14 A. What does "generally and currently paid" 15 mean? The -- the -- the purchase price for an 16 individual entity, regardless of whether it's a 17 retail pharmacy or a wholesaler, is the price that 18 they paid for at the time that they purchased the 19 product and, in fact, that is the price that they 20 generally paid at that point in time. 21 If they qualified -- if -- if they did 22 not qualify for base deal pricing, they were paying 23 WAC or list price. That is a price that they were 24 generally paying. 25 Q. You raise a good question, and so I'll --</p>
<p style="text-align: right;">Page 243</p> <p>1 MR. BERLIN: Objection, form. 2 Misstates the testimony. 3 A. I didn't ask her for copies of those 4 documents. 5 Q. (BY MR. ANDERSON): Well, looking at 6 subsection "c" of -- of topic 6, do you see that 7 request for the identity of each document relied 8 upon? 9 A. I see that. 10 Q. Do you know if those documents even exist? 11 MR. BERLIN: You- -- objection, 12 scope. I mean, you're talking about an a- -- aspect 13 that we -- we had narrowed it beyond that. Go 14 ahead. You can answer. 15 A. I don't know whether those documents are 16 still in her files or not. 17 Q. (BY MR. ANDERSON): Other than her, are you 18 aware of anyone else at Abbott who's reviewed any OIG 19 documents? 20 MR. BERLIN: Based on your 21 investigation. 22 A. Not based on my investigation. That 23 doesn't mean that there weren't. And -- and as I 24 testified, I believe, earlier this morning, I can't 25 say that I, myself, haven't seen them. I just don't</p>	<p style="text-align: right;">Page 245</p> <p>1 I'll pose it to you, Mr. Fiske. 2 Does Abbott have an understanding of 3 what "generally paid" means for a given drug at a 4 given time? 5 MR. BERLIN: Objection, form. 6 Objection, scope. 7 A. I don't know what "generally paid" means. 8 It could be defined in many different ways. 9 Q. (BY MR. ANDERSON): Would you agree that 10 "generally paid" does not mean five percent of the 11 time? 12 MR. BERLIN: Objection, form. 13 Objection, scope. 14 A. The -- if you're talking about a specific 15 price, a price is generally paid by the purchasers 16 who are purchasing at that price. If you're talking 17 about an average price or something, that's something 18 else, and that's probably something that nobody 19 pays. 20 So I don't know how to answer your 21 question any differently than I have. 22 Q. Well, at any given time, for instance, 23 Abbott is selling erythromycins to this day out into 24 the marketplace, correct? 25 A. Yes.</p>

62 (Pages 242 to 245)

Page 246

1 Q. Okay. And today it's your testimony that
2 WAC prices are generally paid for the erythromycins,
3 because every time a wholesaler buys an erythromycin,
4 they are invoiced at WAC -- the published WAC,
5 correct?

6 A. Yes.

7 Q. Okay. But prior to July of 2003, that
8 wasn't true, was it?

9 MR. BERLIN: Objection, form.

10 A. Prior to 2003, it wasn't true that
11 wholesalers were being pa- -- were -- were paying WAC
12 or list price for the product? Yes, it was true.

13 Q. (BY MR. ANDERSON): No, sir. Prior to --

14 A. Some of them were.

15 Q. I'll rephrase to make it specific enough to
16 address your concern.

17 Prior to July 1, 2003, wholesalers
18 were buying the erythromycin products 90 to 95
19 percent of the time at deal price, correct?

20 A. That's a true statement, sir.

21 Q. So is it true that prior to July 1 of 2003,
22 the WAC prices were not generally paid by
23 wholesalers?

24 A. Sir, I will say this. The WAC prices were
25 paid by some of the wholesalers some of the time.

Page 247

1 There were more purchases made by wholesalers at base
2 deal price than were made at WAC. I will agree to
3 those two statements.

4 Q. And since there were more sales at deal
5 price than WAC, wouldn't you agree that the deal
6 price was the price generally paid, because it was
7 more often than not that that was the price paid?

8 MR. BERLIN: Objection, form.

9 A. It was the price that was generally paid
10 for the -- by the people that were buying at base
11 deal price.

12 Q. (BY MR. ANDERSON): And it was the price
13 that was generally paid for the entire class of
14 customers known as wholesalers?

15 MR. BERLIN: Objection, form. I --
16 I -- I -- and -- and asked and answered, to add to
17 it.

18 A. You know, I -- I -- I've answered your
19 question a number of times, sir, and I don't know
20 that I'm going to change the way I'm answering your
21 question, because as I've stated a number of times,
22 those purchasers who were paying -- purchasing, I'm
23 sorry, at WAC or list price because they didn't
24 qualify for base deal pricing were generally, if not
25 always, paying WAC or list price.

Page 248

1 Those customers who qualified for base
2 deal pricing, once they qualified, were generally, if
3 not always, paying base deal pricing.

4 And those that qualified for contract
5 pricing were generally, if not always, paying that
6 contract price.

7 Q. (BY MR. ANDERSON): I totally understand
8 your differentiation, Mr. Fiske. It's not that I
9 don't understand it. I'm trying to ask you a more
10 broad question, which is: Will you agree with the
11 simple assertion that as a matter of fact, prior to
12 July 1 of 2003, the class of customers known as
13 "wholesalers" were generally paying deal price, not
14 WAC price?

15 A. I told you that --

16 MR. BERLIN: Wait. Can I have that
17 question back?

18 (Requested testimony read back.)

19 MR. BERLIN: Objection, form.

20 A. I will agree that there were more wholesale
21 purchases at base deal price -- significantly higher
22 percentage of purchase at base deal price than there
23 were at WAC.

24 Q. (BY MR. ANDERSON): Okay. Likewise, now
25 shifting over to direct, or also known as "list

Page 249

1 price," will you agree that for the erythromycin
2 products, the pharmacies generally pay chain price or
3 RBG, retail buying group price, not list price?

4 A. I will agree that the chain pharmacies and
5 members of RBG contracts usually paid the contract
6 price for the product, and there were more purchases
7 at contract price than there were at WAC or list
8 price.

9 Q. So, accordingly, the WAC or list prices for
10 pharmacies did not reflect the prices generally paid
11 by pharmacies, did they?

12 MR. BERLIN: Objection, form.

13 A. It reflected a price that certain payors
14 were paying for the product, and I told you that I
15 agreed that there were more purchases made at the
16 contract price than there were at the list or WAC
17 price.

18 Q. (BY MR. ANDERSON): Do you have any
19 information other than what you've conveyed here
20 today that the government approved of Abbott
21 publishing WAC prices that were not typically the
22 transaction prices for wholesalers prior to July of
23 2003?

24 MR. BERLIN: Objection to form.

25 Misstates standard, misstates e- -- the evidence,

63 (Pages 246 to 249)

<p style="text-align: right;">Page 250</p> <p>1 assumes facts not in evidence, calls for speculation, 2 lack of foundation, and outside the scope. 3 A. Other than what I've already stated, no. 4 Q. (BY MR. ANDERSON): Do you have any 5 information other than that that you've conveyed here 6 today that the government approved of Abbott's 7 publication of list prices that were not the prices 8 typically paid by pharmacies for the erythromycins? 9 MR. BERLIN: Ob- -- same objections. 10 A. I -- I still think it misrepresents facts, 11 because there were purchases made at list price. But 12 other than what I've already stated in my testimony, 13 no. 14 Q. (BY MR. ANDERSON): And what you've stated 15 in your testimony today can be summarized as a 16 conversation that Martha Schrader -- I mean -- pardon 17 me, not a conversation, a description that Martha 18 Schrader provided to you a few weeks ago of her 19 review of some OIG reports, correct? 20 A. That's one of the items. 21 Q. A conversation that an Abbott 22 representative had with a California Medicaid 23 representative, correct? 24 A. Correct. 25 Q. And your general knowledge that AMP prices</p>	<p style="text-align: right;">Page 252</p> <p>1 MR. ANDERSON: -- where we were. 2 Q. (BY MR. ANDERSON): But then in the actual 3 language of the, quote, "Objection & Designation," 4 you see in the fourth line, there's a reference there 5 to "generally and contemporaneously available"? Do 6 you see that? 7 A. I see that. 8 Q. Do you have any understand- -- 9 understanding of what that phrase means? 10 A. Well -- I don't know what 11 "contemporaneously available" means, but I think it 12 means that the list prices that were reported to the 13 data agencies by Abbott were the prices that were 14 available in the marketplace. 15 Q. So it's kind of like a self-fulfilling 16 prophecy in the sense that once it's published, it's 17 available, and since it's available, it's okay to be 18 published? 19 A. More importantly, it's a price that people 20 purchased at. 21 Q. But for the Erys, that's not true? 22 A. It absolutely is true. They did purchase 23 at WAC and list price. 24 Q. Just not normally? 25 MR. BERLIN: Objection, form.</p>
<p style="text-align: right;">Page 251</p> <p>1 have been transmitted from Abbott to the United 2 States Health and Human Services Commission from 1991 3 to the present? 4 A. And to some states for a shorter period of 5 time, that's correct. 6 Q. Yes, sir. And there's not any other 7 information that you're aware of? 8 MR. BERLIN: Objection, form. 9 Misstates testimony. 10 A. Not that comes to mind at this time. 11 Q. (BY MR. ANDERSON): Looking at the actual 12 designation to topic number 6, Mr. Fiske, do you see 13 there in the fourth line there's a reference to the 14 phrase "generally and contemporaneously available"? 15 A. (Reviews document.) Generally and 16 currently avail- -- paid? Where are you talking -- 17 I'm sorry. Which -- I -- yes, I see. 18 Q. In the designa- -- I'm sorry. I should 19 have been a little more specific. It -- you're -- 20 you're right that in my topic it reads "generally and 21 currently paid," but -- 22 MR. BERLIN: What topic number are you 23 back on? 24 MR. ANDERSON: I'm on 6 -- 25 MR. BERLIN: Uh-huh.</p>	<p style="text-align: right;">Page 253</p> <p>1 A. There were much -- 2 MR. BERLIN: Go ahead. Let me get my 3 objection out. It's -- 4 THE WITNESS: Sure. 5 MR. BERLIN: It's asked and answered 6 multiple times. It's getting to the point where it's 7 just argumentative. Go ahead. You may answer it 8 again. 9 A. There were always purchases at WAC and list 10 price, albeit at a smaller percentage of sales than 11 those purchased at either contract price or base deal 12 pricing. 13 Q. (BY MR. ANDERSON): I hate to bounce around 14 like this, Mr. Fiske, but I need to go back to topic 15 number 3 for a moment. 16 A. 3? 17 Q. Without belaboring the -- your prior 18 testimony, but just by way of background, I believe 19 you've testified that Abbott knew First DataBank was 20 publishing AWP's that were 125 percent of the 21 published WAC prices for the Erys, correct? 22 MR. BERLIN: Objection, form. 23 A. Reverse-engineering things, that's the -- 24 the number that we saw for the Erys, yes. 25 Q. (BY MR. ANDERSON): And -- and Abbott</p>

64 (Pages 250 to 253)

Page 254

1 actually estimated AWP's for its drugs and reported
2 those as, quote, "AWP's," using that same formula of
3 125 percent; is that correct?

4 A. It's -- it's my understanding that's how we
5 arrived at that factor to begin with.

6 Q. Right. Why did Abbott allow the
7 publication of its AWP's based on that formula and
8 markup from WAC?

9 MR. BERLIN: Objection, form, and
10 asked and answered.

11 A. As I explained to you earlier, I don't know
12 that we set AWP's. We communicated an estimated AWP.
13 We communicated a WAC and a list price. I told you
14 about the conversation that Mark Turon had with Kay
15 Morgan.

16 I don't know that you can say that we
17 allowed the publication. We were told by a -- an
18 executive at a data agency that they were verifying
19 what the appropriate calculations for AWP were. I
20 don't know what their formula was, what their method
21 for verifying those prices were other than that --
22 than Mark Turon was told that it was done in
23 conjunction with wholesalers.

24 I don't know that it was our position
25 to question wh- -- how they were arriving at an AWP.

Page 255

1 Q. (BY MR. ANDERSON): Look, if you could,
2 Mr. Fiske, at Exhibit No. 16 again, please.

3 A. Yes.

4 Q. And if you could, loo- -- focus on the last
5 page of Exhibit 16.

6 A. (Reviews document.)

7 Q. And, specifically, there's a quote there
8 attributable to a First DataBank executive toward the
9 middle of the page?

10 A. Which page am I supposed to be looking at,
11 please?

12 Q. Oh, I'm sorry. It's not the last page.
13 It's the second to last page.

14 A. Yes.

15 Q. The -- I'm look- -- focussing on the
16 paragraph that begins with the word "But"?

17 A. Yes.

18 Q. And I'm reading for the record, quote, "But
19 First DataBank Executive Vice President and Chief
20 Operating Officer Jim Wilson said the company has
21 'nothing to do with setting the prices. We simply
22 collect the information from drug companies and
23 wholesalers and pass it along' to governments and
24 other insurers". Did I read that correctly?

25 A. Yes, you did.

Page 256

1 Q. Do you think back in 2001 you had an
2 understanding that First DataBank's position was that
3 they were just republishing information gained from
4 wholesalers and drug companies?

5 MR. BERLIN: Objection, form.

6 A. I don't know what --

7 MR. BERLIN: It doesn't -- it doesn't
8 state that.

9 A. -- their position was. I don't know what
10 their position was. This is what one individual is
11 saying. All I could relate to you is a conversation
12 that Mark Turon had with Kay Morgan.

13 Based on some information that's been
14 in the newspapers in recent years, there's been some
15 admissions that First DataBank didn't do some of the
16 things that they said they were doing, or maybe did a
17 poor job of them, but -- they were supposedly doing
18 surveys of wholesalers but it turns out maybe they
19 weren't wholesalers multiple but maybe one.

20 But is it my responsibility as a
21 manufacturer to police the activities of a data
22 agency? I don't know the answer to that question,
23 but I think not.

24 Q. (BY MR. ANDERSON): With respect to what
25 Abbott could control, when Abbott received the annual

Page 257

1 price verifications, couldn't Abbott have simply
2 drawn a line through all of the AWP's and said "do not
3 publish"?

4 MR. BERLIN: Objection, form.

5 A. It calls for speculation. I don't know.

6 Q. (BY MR. ANDERSON): Well, are you aware of
7 any reason why Abbott was somehow prevented from
8 causing the data agencies to not publish AWP's?

9 A. I didn't cause the data agencies to publish
10 the AWP's that they published.

11 MR. ANDERSON: Objection,
12 nonresponsive.

13 Q. (BY MR. ANDERSON): Sir, are you aware of
14 any prohibition that would have prevented Abbott from
15 instructing the data companies to not publish AWP's
16 for Abbott drugs?

17 A. No.

18 Q. So to the extent Abbott had any problems
19 with the AWP's or the manner in which the AWP's were
20 published for the -- erythromycin specifically,
21 Abbott could have simply told the data services
22 "don't publish," correct?

23 A. I don't know. I don't know.

24 Q. Now, going back into the pre-2001 time
25 frame when Abbott was actually submitting a field of

65 (Pages 254 to 257)

Page 258

1 data known as AWP to the pricing services, why did
2 Abbott do that?

3 A. I don't know that either. It's because
4 they had done it for a long time. Nobody could tell
5 me why we were reporting it.

6 Q. Other than the fact that it was done for a
7 long time, it's your testimony that Abbott, as an
8 organization, doesn't have any other information
9 reasonably available to it on why these AWP's were
10 published?

11 MR. BERLIN: Objection, form.
12 Objection, scope.

13 A. Are you asking me why they were published
14 by the data agencies or why -- what are you -- what
15 are you asking me, please?

16 Q. (BY MR. ANDERSON): I'll -- I'll be very
17 specific, and I'll focus on this 2001 -- roughly 2001
18 time period back to 1994.

19 With that understanding, please
20 describe all information that Abbott has as to why
21 Abbott sent prices titled "AWP's" to the data
22 services.

23 MR. BERLIN: Objection, form.
24 Objection, scope.

25 A. I actually asked Mark Turon why we reported

Page 259

1 what we had -- had reported, because he actually had
2 been in the Pricing Department longer than I had, and
3 his response was "because that's what we had always
4 done".

5 That's what he thought he had been
6 instructed to do by Russ Lehn, I believe, at the time
7 was the pricing manager. He was probably following
8 what his predecessor had reported. That -- that is
9 frequently the way things happen.

10 Why those were the numbers that
11 originally started being reported, I don't know the
12 answer to that. The WAC and the list price that we
13 reported was what we thought we should report.

14 Q. (BY MR. ANDERSON): Is it true that one of
15 the reasons why Abbott was sending AWP's to the
16 pricing services was so the AWP's would be published
17 out to third-party payors like Medicaid for
18 reimbursement?

19 MR. BERLIN: Objection, form.

20 A. I don't know.

21 Q. (BY MR. ANDERSON): At the minimum, you'll
22 agree, won't you -- and I believe you've already
23 testified several times -- that Abbott knew the AWP's
24 that were being published were being used for
25 reimbursement, correct?

Page 260

1 MR. BERLIN: Objection, form.

2 A. Yes.

3 Q. (BY MR. ANDERSON): And Abbott didn't
4 somehow disregard that knowledge or forget that
5 information when the AWP's were published, did it?

6 A. No, but, sir, I don't think we ever had to
7 report the AWP's. Clearly, we don't report the AWP's
8 today, and they still get reported by a data agency.

9 They're developing them some way or
10 another, and they have ever since we stopped
11 reporting an estimated AWP. So clearly we never had
12 to report an AWP.

13 Q. Yeah, the -- the "some way or another" is
14 the specific markup that they've attributed to
15 Abbott's drugs and notified Abbott of in those
16 e-mails you reviewed, correct?

17 A. That certain Abbott people reviewed.

18 MR. ANDERSON: I'm actually going to
19 be moving on to a different topic. I can do that and
20 we can go for a few more minutes, or we can break.

21 MR. BERLIN: What time is it?

22 MR. ANDERSON: Ten till.

23 MR. BERLIN: I mean, we're going to
24 break at 5:00, so it's really -- and -- and Joe is
25 prepared to go till 5:00, but it's your choice.

Page 261

1 I don't -- I mean, it doesn't really
2 matter one way or another, I think. We can wait till
3 tomorrow. I -- I mean -- how much -- do we know how
4 much time is on the video? How much has total --
5 totally elapsed?

6 THE VIDEOGRAPHER: We have 15 minutes
7 left on this tape.

8 MR. BERLIN: No, my question is how
9 much total video time has elapsed?

10 THE VIDEOGRAPHER: All day?

11 MR. BERLIN: Yeah.

12 THE VIDEOGRAPHER: About five-15 --
13 about five hours and 15.

14 MR. BERLIN: Are you intending to --
15 how much time do you think you need tomorrow?

16 MR. ANDERSON: I don't think I'm going
17 to need more than a couple of hours, actually.

18 MR. BERLIN: Okay. Whatever you --
19 whatever you want to do, Jarrett. We have ten
20 minutes. You can use it or we can --

21 MR. ANDERSON: I think --

22 MR. BERLIN: -- pack it up.

23 MR. ANDERSON: -- it's more convenient
24 to just start fresh tomorrow on a new topic.

25 MR. BERLIN: Okay. Your choice.

66 (Pages 258 to 261)

<p style="text-align: right;">Page 262</p> <p>1 That's fine.</p> <p>2 THE VIDEOGRAPHER: We are off the</p> <p>3 record at 4:49 p.m. This is the end of tape 5.</p> <p>4 (Deposition recessed.)</p> <p>5</p> <p>6</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p style="text-align: right;">Page 264</p> <p>1 I, JOSEPH F. FISKE, have read the foregoing</p> <p>2 deposition and hereby affix my signature that same is</p> <p>3 true and correct, except as noted above.</p> <p>4</p> <p>5</p> <p>6 JOSEPH F. FISKE</p> <p>7</p> <p>8</p> <p>9 THE STATE OF)</p> <p>10 COUNTY OF)</p> <p>11</p> <p>12 Before me, , on this</p> <p>13 day personally appeared JOSEPH F. FISKE, known to me</p> <p>14 [or proved to me on the oath of</p> <p>15 or through (description of</p> <p>16 identity card or other document)] to be the person</p> <p>17 whose name is subscribed to the foregoing instrument</p> <p>18 and acknowledged to me that he executed the same for</p> <p>19 the purposes and consideration therein expressed.</p> <p>20 (Seal) Given under my hand and seal of office</p> <p>21 this day of , 2009.</p> <p>22</p> <p>23</p> <p>24</p> <p>25 Notary Public in and for the State of Texas</p>
<p style="text-align: right;">Page 263</p> <p>1 CHANGES AND SIGNATURE</p> <p>2 WITNESS NAME: JOSEPH F. FISKE February 17, 2009</p> <p>3 PAGE/LINE CHANGE REASON</p> <p>4</p> <p>5</p> <p>6</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p style="text-align: right;">Page 265</p> <p>1 THE STATE OF TEXAS)</p> <p>2 COUNTY OF BEXAR)</p> <p>3</p> <p>4 I, TAMMY POZZI, Certified Shorthand</p> <p>5 Reporter in and for State of Texas, do hereby certify</p> <p>6 that, pursuant to agreement of counsel, there came</p> <p>7 before me on February 17, 2009 at 9:05 a.m. in the</p> <p>8 law offices of Jones Day, 77 West Wacker, 35th Floor,</p> <p>9 Chicago, Illinois, the following named person,</p> <p>10 to-wit: JOSEPH F. FISKE, who was by me duly sworn to</p> <p>11 testify to the truth and nothing but the truth of his</p> <p>12 knowledge touching and concerning the matters in</p> <p>13 controversy in this cause; that he was thereupon</p> <p>14 carefully examined upon his oath and his examination</p> <p>15 reduced to typewriting under my supervision; and that</p> <p>16 the deposition is a true record of the testimony</p> <p>17 given by the witness.</p> <p>18 I further certify that I am neither</p> <p>19 attorney nor counsel for, nor related to or employed</p> <p>20 by, any of the parties to the action in which this</p> <p>21 deposition is taken, and further that I am not a</p> <p>22 relative or employee of any attorney or counsel</p> <p>23 employed by the parties hereto nor financially</p> <p>24 interested in the action.</p> <p>25</p>

67 (Pages 262 to 265)

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Page 266

1 IN WITNESS WHEREOF I have hereunto set my
2 hand and seal on this the 2nd day of March, 2009.

Tammy Pozzi

3
4 C.S.R. NUMBER 5629 TAMMY POZZI, Certified
5 Expires 12/31/10 Shorthand Reporter in
and for the State of Texas.

6
7 FIRM NUMBER 611
Expires 12/31/10

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68 (Page 266)

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

In re: PHARMACEUTICAL)
INDUSTRY AVERAGE WHOLESALE)
PRICE LITIGATION) MDL No. 1456
)
THIS DOCUMENT RELATES TO:) Civil Action No.
) 01-12257-PBS
US ex rel Ven-A-Care of)
the Florida Keys, Inc.)
v. Abbott Laboratories, Inc.)
No. 07-CV-11618-PBS)

VIDEOTAPED ORAL DEPOSITION OF JOSEPH E. FISKE

Volume 2

February 18, 2009

DEPOSITION upon videotaped oral
examination, of the witness, JOSEPH E. FISKE, taken
on behalf of Ven-A-Care of the Florida Keys, Inc. in
the above entitled cause pending in the United States
District Court, District of Massachusetts, before
TAMMY POZZI, Certified Shorthand Reporter in and for
the State of Texas, on February 18, 2009, in the law
offices of Jones Day, 77 West Wacker, 35th Floor,
Chicago, Illinois, between the hours of 9:08 a.m. and
11:59 a.m., pursuant to due notice and the Federal
Rules of Civil Procedure.

Page 268

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Videographer

Page 269

I N D E X

P A G E

Appearances. 268

JOSEPH E. FISKE

Examination by Mr. C. Jarrett Anderson. . . 270

Witness's Signature Page/Corrections 380

Reporter's Certificate 382

E X H I B I T S

DESCRIPTION IDENTIFIED

17 PPD User Acceptance Testing - Many Medicaid
8.4.1 Release 3.0 287

18 Potential Issues and Talking Points 302

19 MS Word Document - Potential Issues and
Talking Points. 30220 Abbott Laboratories Pharmaceutical Products
Division, Subject: Federal Health Care Program
and Other Third Party Payor Requirements -
United States - Reimbursement Information and
Support 309

21 Neoral Profit Analysis. 323

22 Abbott R-04 Rebate Mail 3Tier, Rebate, Mail
Order Rebate Report 1/1/2004 Thru 3/31/2004 360

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Page 270

P R O C E E D I N G S

THE VIDEOGRAPHER: We are on the record. It is Wednesday, February 18th, 2009. It is 9:08 a.m. This is the beginning of tape 6.

Will you the court -- oh, sorry.

We're already -- you're already under oath, so you can begin.

E X A M I N A T I O N C O N T I N U E D

BY MR. ANDERSON:

Q. Good morning, Mr. Fiske.

A. Good morning.

Q. We're going to continue your deposition this morning, okay?

A. Sure.

Q. All right.

MR. WINGET-HERNANDEZ: Jarrett?

MR. ANDERSON: Ye- -- Oh, yeah, sure.

MR. WINGET-HERNANDEZ: This is Michael Winget-Hernandez. I'm making an appearance today on behalf of my clients which are the states of Illinois, Wisconsin, Kentucky, South Carolina, Idaho, Hawaii and Arkansas pursuant to cross-notice filed yesterday.

MR. BERLIN: And this is Eric Berlin for Abbott Laboratories. And we have an objection to

Page 271

the notices coming so late, but without waiving that objection, we're going to permit counsel to listen in on this session today.

MR. WINGET-HERNANDEZ: Right. And I -- just for the record, we discovered that these depositions, including Mr. Fiske's deposition, were to take place only yesterday morning. So just -- that -- you know, I'm -- I'm -- I understand that you're reserving your objections and so on, but I thought I would go ahead and make mention of that.

I -- I -- I probably won't have any questions today, so I'll just sit -- sit here and listen and -- and if it turns out that I do have questions, we can work that out.

MR. BERLIN: Yeah. I think we'll cross that bridge if -- if we actually come to it. Okay. Great.

MR. WINGET-HERNANDEZ: Thank you.

MR. BERLIN: Go ahead, Jarrett.

MR. ANDERSON: Sure. I'm also going to just, for what it's worth, note on the record that this deposition today is not only a continuation of not only yesterday's deposition, but technically it's a continuation of some -- an additional deposition that Mr. Fiske provided in March of 2007, in the

2 (Pages 268 to 271)

<p style="text-align: right;">Page 272</p> <p>1 sense that that deposition -- we are not -- I am 2 purposefully trying not to duplicate lines of 3 questions that were pursued in March of 2007. For 4 what it's worth. 5 MR. BERLIN: Right. Understood. And 6 we have an agreement as to -- to what extent previous 7 depositions could be used in this litigation. 8 I don't know that I view this as a 9 continuation of the earlier deposition, but I don't 10 think we necessarily disagree with anything else that 11 you said, and -- and we -- we would expect you not to 12 go over things that were went over in the previous 13 deposition. 14 Q. (BY MR. ANDERSON): Okay. With all of the 15 statements behind us, Mr. Fiske, if you could, direct 16 your attention again to topic number 1 in the -- 17 Exhibit 1 which is your deposition notice. 18 And this topic pertains to Abbott's 19 knowledge of Medicaid agency policies, practices, 20 etcetera, regarding reimbursement, correct? 21 A. Yes, it does. 22 Q. Okay. Does Abbott understand -- and I 23 touched on this some yesterday, but I'm going to just 24 ask a couple of foundational questions again to get 25 back into this area.</p>	<p style="text-align: right;">Page 274</p> <p>1 Q. Okay. And you're -- of the -- of the 2 departments or people that you just listed, you're 3 the one who would be in a pricing -- price setting or 4 price publication position, correct? 5 A. I don't actually set prices, but I am 6 responsible for implementing price actions when 7 people decide upon them, and we are responsible for 8 price reporting in my department, yes. 9 Q. Does Abbott understand that under federal 10 regulation, estimated acquisition cost is defined as 11 the cost generally and currently paid by providers? 12 MR. BERLIN: Objection, form, and 13 objection to scope. 14 A. I think that's the general understanding of 15 the people that know about the provision, yes. 16 Q. (BY MR. ANDERSON): Okay. Is it more 17 likely than not, sir, that prior to your preparation 18 for your deposition in March of 2007, that you did 19 have some understanding of Medicaid's efforts to 20 estimate acquisition costs? 21 A. I -- I believe so, because while I don't 22 focus on reimbursement issues, I was quite involved 23 with DRA two-thousand-fi- -- yeah, the Defect 24 Reduction Act of 2005 and some of the changes for the 25 Medicaid re- -- rebate program. I was primarily</p>
<p style="text-align: right;">Page 273</p> <p>1 Does Abbott understand that Medicaid 2 regulations require Medicaid programs to estimate 3 provider acquisition cost? 4 A. Yes, we have that understanding. 5 Q. And what departments specifically within 6 Abbott have that understanding? 7 MR. BERLIN: Based on your 8 investigation. 9 THE WITNESS: Yes. 10 A. There are people who work in State 11 Government Affairs that have that understanding. 12 Martha Schrader who is our Divisional Vice President 13 of Public Policy and -- I always get confused with 14 her title, I apologize -- Strategy has that 15 understanding. 16 I don't know when I became aware of 17 that, but I know that I have that understanding. If 18 I didn't have it before the depositions, I certainly 19 became aware of it during the depositions. I don't 20 remember exactly when I became aware of it. 21 Q. (BY MR. ANDERSON): The -- the depositions 22 that you're referring to include your deposition back 23 in March of 2007? 24 A. I'm specifically referring to that 25 deposition, yes.</p>	<p style="text-align: right;">Page 275</p> <p>1 focused on those changes affecting manufacturers in 2 terms of reporting issues, though. 3 Q. Re- -- reporting issues in that context 4 pertaining to AMPs and BPs? 5 A. The calculation and reporting of those 6 numbers, yes. 7 Q. Okay. When -- did any of your -- I take 8 it that some of your work with respect to the 9 deficit- -- Deficit Reduction Act of 2005 did touch 10 upon Medicaid drug reimbursement issues; is that 11 true? 12 A. The only thing that I really was aware of 13 was that the government was evaluating changes in the 14 reimbursement formula as it relates to multisource 15 drugs and I guess the determination of federal upper 16 limits. 17 Q. And what -- can you summarize what you 18 learned in that regard? 19 A. So -- federal upper limits used to be 20 established, prior to DRA 2005, when I believe it was 21 three more or our drugs were available on the 22 marketplace, meaning at least two AB-rated generics 23 plus a brand. And there were various formulas, but 24 one of the references that you see frequently is to 25 150 percent of the lowest AWP but then it goes on to</p>

3 (Pages 272 to 275)

<p style="text-align: right;">Page 276</p> <p>1 say or estimated acquisition cost or usual and 2 customary. There's -- there's a number of different 3 things, and I, quite frankly, don't recall all of 4 them because I -- I don't really track all of that. 5 DRA changed that in two major 6 respects. F- -- federal upper limits would be 7 established under DRA when a -- a first generic 8 launched. In other words, as soon as there were two 9 drugs on the marketplace that were AB-rated to one 10 another, an FUL might be established. 11 And the FUL would be established based 12 on the average manufacturer price reported by 13 manufacturers rather than based on an A- -- AWP. 14 MR. WINGET-HERNANDEZ: Excuse me. I'm 15 sorry for interrupting, but it would be very nice 16 indeed if we could move the conference phone a little 17 closer to the witness. 18 MR. BERLIN: Yeah, we're doing it. 19 MR. ANDERSON: Oh, sorry. 20 MR. BERLIN: So -- that's okay. So, 21 you know, listen for a little bit, and if there's a 22 natural break, let us know if that is not 23 sufficient. 24 Q. (BY MR. ANDERSON): Did you understand that 25 any sector of the pharmaceutical industry objected to</p>	<p style="text-align: right;">Page 278</p> <p>1 Q. Okay. 2 A. I think it was pharmacy trade organizations 3 actually, wasn't it? I -- I may be wrong. 4 Q. Did you understand that prior to this 5 proposal with the DRA, that FULs were based on lowest 6 published prices, including, for instance, wholesale 7 prices such as WAC? 8 A. I -- as I explained earlier, actually, I -- 9 I -- I don't know that that's a completely correct 10 statement because I believe that FULs were based on 11 any number of different factors. 12 As I explained, there -- there was a 13 look at usual and customary charges from retail 14 pharmacies, estimated acquisition costs by retail 15 pharmacies. Some of those were determined by states 16 doing surveys. Some of them, in fact, may have been 17 based on information reported by pricing compendia. 18 Q. What -- other than the FUL issues, what 19 other drug reimbursement knowledge did you gain from 20 your work with respect to the DRA 2005? 21 A. I don't recall -- excuse me. I don't 22 recall that I did, but I -- it -- you know, if 23 something comes up, I'll tell you it reminds me. 24 My focus was, as I stated earlier, 25 really on the impact on the manufacturer in terms of</p>
<p style="text-align: right;">Page 277</p> <p>1 the proposal that FULs, or federal upper limits, be 2 calculated based upon reported AMP prices? 3 MR. BERLIN: Objection to form as to 4 "the pharmaceutical industry," and objection to 5 scope. 6 A. Retailers were upset. Some of the retail 7 trade organizations such as NACDS and National 8 Community Pharmacy Association, I believe even some 9 of the wholesalers' associations lobbied not only in 10 terms of the information that would be includable in 11 the calculation of the average manufacture price, as 12 well as the multiple of AMP that they would be 13 reimbursed at. 14 Q. (BY MR. ANDERSON): Do you have an 15 understanding if the proposed changes in the 16 calculation of federal upper limits was ever actually 17 implemented? 18 A. There's a lawsuit that's pending, and no, 19 they have not been implemented yet -- 20 Q. As a result -- 21 A. -- to the best of my knowledge. 22 Q. And the FUL changes were not implemented as 23 a result of a lawsuit filed by multiple groups 24 including pharmacies, correct? 25 A. I believe that's a correct statement.</p>	<p style="text-align: right;">Page 279</p> <p>1 the calculating and reporting of AMPs and BPs. 2 Q. Okay. Other than personnel in State 3 Government Affairs such as Mr. Johnson -- well, 4 strike that. Let me back up. 5 When you referenced State Government 6 Affairs in your prior answer about departments that 7 were aware government Medicaid programs were 8 estimating acquisition costs to pharmacies, were you 9 limiting that knowledge to Mr. Johnson, or was that 10 more broad knowledge held by other individuals? 11 A. Mr. Johnson indicated to me when I spoke 12 with him that the individuals who report to him that 13 actually monitor activities in the various states 14 would have been aware of the individual state 15 formulas perhaps in -- 16 Q. Uh-huh. 17 A. -- as it related to their work. But that's 18 the extent of it, I believe. 19 Q. Okay. Did you get the understanding that 20 Mr. Johnson's personnel in the State Government 21 Affairs Department also understood that state 22 Medicaid programs were trying to estimate the prices 23 generally and currently paid by pharmacies? 24 MR. BERLIN: Objection, form. 25 A. Mr. Johnson didn't communicate that to me</p>

4 (Pages 276 to 279)

<p style="text-align: right;">Page 280</p> <p>1 when I went through the list of topics that I was 2 supposed to prepare on. He didn't -- he indicated 3 that all they had knowledge of was that there were 4 reimbursement levels that were based on AWP. 5 He didn't know where those AWP's 6 actually came from. He assumed they came from a 7 pricing compendia, but he didn't know, in fact, where 8 they came from or whose they used, how they were 9 determined, etcetera. 10 Q. He didn't go into that level of detail 11 about his personnel's understanding of EAC; is that 12 true? 13 A. Mr. Anderson, as I told you earlier, Dale 14 Johnson was one of the people that I actually went 15 through each of the topics that I was expected to 16 prepare on -- 17 Q. Uh-huh. 18 A. -- and actually provided him a copy of the 19 document -- 20 Q. Uh-huh. 21 A. -- so that we could discuss each of them, 22 and he -- he pretty much had no knowledge regarding 23 most of the topics that we discussed, and only gave 24 me the information I have related to you so far. 25 Q. Okay. And -- I understand that. And so,</p>	<p style="text-align: right;">Page 282</p> <p>1 reported prices for the erythromycin products? 2 MR. BERLIN: Objection, form. 3 A. We neither received anything indicating 4 that they have approved, nor we have -- have we 5 received anything that said they didn't approve, 6 other than the lawsuits. 7 Q. (BY MR. ANDERSON): And -- and you and I 8 know this, but I need to state this for the record. 9 The lawsuits that you're referring to are the 10 different lawsuits that have been filed against 11 Abbott by various states related to Abbott's price 12 reporting practices; is that true? 13 A. Yes. 14 Q. Okay. Including the lawsuit for which -- 15 one of the lawsuits for which we're here today which 16 was brought by my client on behalf of the United 17 States of America? 18 A. That's correct. 19 Q. Okay. 20 MR. BERLIN: Well, actually, let me -- 21 let- -- let- -- let's just be clear on that, because 22 the -- because I don't know whether Mr. Fiske 23 remembers that the government has chosen not to 24 participate in this lawsuit. 25 So his original question is going back</p>
<p style="text-align: right;">Page 281</p> <p>1 accordingly, for instance, with respect to topic 2 number 1, he didn't provide you with any specific 3 information about the knowledge that people in his 4 department held with respect to EAC representing the 5 prices generally and currently paid by providers; is 6 that true? 7 MR. BERLIN: Object- -- I'm sorry. 8 Objection, form. 9 A. That's true. 10 Q. (BY MR. ANDERSON): With respect to any 11 other Abbott personnel that you are aware of, other 12 than State Government Affairs, Martha Schrader, and 13 yourself in Pricing, are you aware of anyone else at 14 Abbott that knew state Medicaid programs were trying 15 to estimate acquisition costs to providers? 16 A. Not from the investigation that I did, no. 17 Q. Are you aware of any communications that 18 Abbott has received from any government officials 19 indicating the Medicaid programs have approved or 20 otherwise gone along with Abbott's price reporting 21 practices? 22 A. No. 23 Q. Are you aware of any communications that 24 Abbott has received that government officials have 25 approved of the specific manners in which Abbott has</p>	<p style="text-align: right;">Page 283</p> <p>1 to the point of whether it's government disapproval, 2 and I don't know whether you mean to include this 3 lawsuit as part of government disapproval. 4 MR. ANDERSON: But my other question 5 was related to state Medicaid's. 6 (Phone ringing.) 7 MR. ANDERSON: Michael? He must -- he 8 must have dropped off. 9 MR. WINGET-HERNANDEZ: Yeah, sorry. 10 That- -- that's probably my phone malfunctioning. 11 Can you pick that up? 12 MR. BERLIN: Hello? 13 MR. WINGET-HERNANDEZ: Yeah, it's -- 14 that's -- that's my phone so just hang that up, I'd 15 appreciate it. 16 MR. ANDERSON: Okay. 17 MR. WINGET-HERNANDEZ: I'm sorry. 18 MR. ANDERSON: That was -- that was 19 that was -- pretty wild, okay. 20 MR. WINGET-HERNANDEZ: Yeah, I 21 apologize for that. 22 MR. ANDERSON: No problem. 23 MR. WINGET-HERNANDEZ: Uh-huh. 24 Q. (BY MR. ANDERSON): All right. Where were 25 we? Okay. I'll -- I'll go on to a new line of</p>

5 (Pages 280 to 283)

<p style="text-align: right;">Page 284</p> <p>1 questions.</p> <p>2 Yesterday, Mr. Fiske, you described a</p> <p>3 conversation you had with Martha Schrader where she</p> <p>4 described her prior review of some OIG reports</p> <p>5 concerning differences between published AWP and</p> <p>6 pharmacy cost, correct?</p> <p>7 A. That's correct.</p> <p>8 Q. Okay. Has Martha Schrader or any other</p> <p>9 Abbott personnel that you're aware of -- strike</p> <p>10 that. Let me rephrase.</p> <p>11 How has -- has Martha Schrader or any</p> <p>12 other Abbott personnel reviewed or interpreted any</p> <p>13 OIG reports or other government reports as showing</p> <p>14 government approval of Abbott's price reporting</p> <p>15 practices?</p> <p>16 A. I don't think that they considered them as</p> <p>17 a commentary on any manufacturers' price reporting</p> <p>18 practices.</p> <p>19 Q. And, likewise, sir, are you aware of any</p> <p>20 Abbott personnel, but specifically Ms. Schrader since</p> <p>21 she's the one that you're aware of, reviewing or</p> <p>22 interpreting any government reports about</p> <p>23 pharmaceutical prices as approval of Abbott's price</p> <p>24 reporting practices with respect to the erythromycin</p> <p>25 drugs?</p>	<p style="text-align: right;">Page 286</p> <p>1 A. Based on my conversation with Martha</p> <p>2 Schrader, I don't think that she viewed the OIG</p> <p>3 reports as a commentary on manufacturers' reporting</p> <p>4 of prices. I think that they were a commentary on</p> <p>5 the publication of prices, perhaps, by data</p> <p>6 agencies. But they had nothing to do with</p> <p>7 manufacturers' reporting of prices.</p> <p>8 Q. Okay. Now switching topics slightly. Are</p> <p>9 you aware of any mechanism by which Abbott personnel</p> <p>10 have been able to review or otherwise rely upon</p> <p>11 internal deliberations of government personnel that</p> <p>12 were not made public?</p> <p>13 MR. BERLIN: Objection, form.</p> <p>14 Actually, can I have that read back? I got --</p> <p>15 (Requested testimony read back.)</p> <p>16 A. We wouldn't have been privy to internal --</p> <p>17 MR. BERLIN: I know, I was confused by</p> <p>18 that.</p> <p>19 A. -- discussions by government personnel.</p> <p>20 Q. (BY MR. ANDERSON): Are you aware of any</p> <p>21 government personnel reviewing or otherwise relying</p> <p>22 upon any government analysis or discussion of drug</p> <p>23 pricing issues that were not made public?</p> <p>24 A. No.</p> <p>25 Q. One of the primary responsibilities of your</p>
<p style="text-align: right;">Page 285</p> <p>1 MR. BERLIN: Objection, form as to --</p> <p>2 and my objection is just to the sort of undefined OIG</p> <p>3 reports. It may be a little confusing as to what</p> <p>4 you're referring to.</p> <p>5 A. I apologize. I lost track of the front end</p> <p>6 of your question.</p> <p>7 Q. (BY MR. ANDERSON): It's a similar</p> <p>8 question. I'm just making it specific to</p> <p>9 erythromycins, but I'll rephrase it.</p> <p>10 A. Thanks.</p> <p>11 Q. And I'll ask it -- I'll break it up --</p> <p>12 A. Okay.</p> <p>13 Q. -- because it got a little long-winded.</p> <p>14 Martha Schrader is the only person</p> <p>15 that you're aware of at Abbott that's reviewed any</p> <p>16 OIG or government reports on drug pricing, correct?</p> <p>17 A. That's the only person I became aware of in</p> <p>18 my investigation.</p> <p>19 Q. Yes, sir. Has Martha Schrader -- strike</p> <p>20 that.</p> <p>21 How has Martha Schrader, if at all,</p> <p>22 interpreted the OIG reports or other government</p> <p>23 reports on drug pricing as government approval of the</p> <p>24 way Abbott has published prices for the erythromycin</p> <p>25 drugs specifically?</p>	<p style="text-align: right;">Page 287</p> <p>1 Pricing Department is the calculation of Medicaid</p> <p>2 rebate prices such as AMPs and BPs, also known as</p> <p>3 best prices, correct?</p> <p>4 A. Yes.</p> <p>5 (Exhibit 17 marked.)</p> <p>6 Q. (BY MR. ANDERSON): And as a part of that</p> <p>7 process, does your department utilize software</p> <p>8 created by a company known as Imany?</p> <p>9 A. Yes.</p> <p>10 Q. And has it done so for many years?</p> <p>11 MR. BERLIN: Objection, form.</p> <p>12 A. Several years.</p> <p>13 Q. (BY MR. ANDERSON): If you could, take a</p> <p>14 look at what's been marked as Fiske Exhibit 17.</p> <p>15 A. (Reviews document.)</p> <p>16 Q. Do you recognize this document?</p> <p>17 A. I don't know whether I've actually seen the</p> <p>18 document before.</p> <p>19 Q. It's titled "PPD User Acceptance Testing,</p> <p>20 dash, Imany," correct?</p> <p>21 A. It is.</p> <p>22 Q. Do you know what that references?</p> <p>23 A. When we get new releases of a product,</p> <p>24 Imany's software, we have to test it to make sure</p> <p>25 that it works as it's supposed to and does the</p>

6 (Pages 284 to 287)

<p style="text-align: right;">Page 288</p> <p>1 calculations correctly,, this is a document that lays 2 out the -- the user acceptance testing to be 3 performed at the time that we implemented Release 4 8.4.1. 5 Q. And that -- that release is a version of 6 the software that Imany sells to or licenses to 7 Abbott and other drug companies so they can calculate 8 Medicaid rebate pricing, correct? 9 MR. BERLIN: Objection, form. 10 Objection, scope. 11 A. I'm -- yes, the -- in general I'll say yes. 12 Q. (BY MR. ANDERSON): What is the -- you 13 meant -- you mentioned some calculations. What is 14 meant by the phrase "Medicaid RPU calculation"? 15 MR. BERLIN: Objection, form. 16 Objection, scope. 17 A. "RPU" is defined as rebate per unit. 18 Q. (BY MR. ANDERSON): Is that synonymous with 19 unit rebate amount? 20 MR. BERLIN: Objection, form. 21 Objection, scope. 22 A. It would be the same. 23 Q. (BY MR. ANDERSON): And the RPUs are a 24 function of the calculations pursuant to federal 25 regulations of AMP and best price, correct?</p>	<p style="text-align: right;">Page 290</p> <p>1 In 2002 we started contracting with 2 states on supplemental rebate programs. Many of 3 those state supplemental rebate programs include 4 supplemental rebates based on an AWP formula, and so 5 we have to load the AWP's from a data reporting agency 6 in order to calculate the rebates that those states 7 would be due. 8 Q. (BY MR. ANDERSON): So in that regard -- 9 well, strike that. I'll ask a background question. 10 Why do some of the states utilize AWP 11 and WAC pricing for purposes of supplemental 12 rebates? 13 MR. BERLIN: Objection, form, 14 foundation. Objection, scope. 15 A. I suppose you'd have to ask them because 16 some of them use an AMP formula, some of them use an 17 AWP formula, some of them use a WAC formula. 18 Q. (BY MR. ANDERSON): Do you -- does -- does 19 Abbott have any understanding of why AWP's and WAC's 20 are utilized by state Medicaid programs in the 21 context of supplemental rebate programs? 22 MR. BERLIN: Objection, form. 23 Objection, scope. 24 A. We've never asked them to my -- to the best 25 of my knowledge. We simply use the formula that they</p>
<p style="text-align: right;">Page 289</p> <p>1 MR. BERLIN: Objection, form. 2 Objection, scope. 3 A. Yes. 4 Q. (BY MR. ANDERSON): Okay. If you could, 5 look at what's Bates labeled Abbott Ery, dash, 6 E24936. It's the third page from the back. 7 A. (Reviews document.) 8 Q. And this page is titled "RPU Calculation 9 Procedures," correct? 10 A. Medicaid rebate per unit calculation. Oh, 11 yes. The top of the document is, yes. 12 Q. And then there's some different tasks that 13 are listed, correct? 14 A. (Reviews document.) Yes. 15 Q. And under the subsection titled "Test Case 16 7.0 Medicaid RPU Calculation," I note that task 7.5 17 reads "Load AWP & WAC Pricing into Imany Medicaid". 18 A. Yes, it does. 19 Q. What does that reference? 20 MR. BERLIN: Objection, form. 21 Objection, scope. 22 A. Well, you have to keep in mind that -- that 23 this would have been 2004 time frame or later, 24 because there's reference to "Hospira" in here. 25 Hospira didn't exist prior to that date.</p>	<p style="text-align: right;">Page 291</p> <p>1 provide. 2 Q. (BY MR. ANDERSON): At least in that 3 context, when Abbott is loading these AWP's and WAC's 4 for purposes of rebates, Abbott is aware that those 5 prices are being utilized by the Medicaid programs? 6 MR. BERLIN: Objection, form. 7 Objection, scope. 8 A. At least in terms of the supplemental 9 rebate calculation. 10 Q. (BY MR. ANDERSON): Does Abbott understand 11 that some of the supplemental rebates are calculated 12 off of those prices because those prices, 13 specifically being AWP and WAC's, are utilized by 14 Medicaid's for drug reimbursement? 15 MR. BERLIN: Objection, form. 16 Objection, scope. 17 A. Yes. 18 MR. BERLIN: Wait. Hold -- I mean -- 19 THE WITNESS: I'm sorry. 20 MR. BERLIN: -- this is so far beyond 21 the scope, a -- a -- state supplemental rebates in 22 this case that you're bringing on behalf of the 23 federal government, and there's nothing in the notice 24 that would -- 25 Can you at least give us a clue as to</p>

7 (Pages 288 to 291)

Page 292	Page 294
<p>1 how -- what your argument would be as to why this is 2 in any -- 3 MR. ANDERSON: Absolutely. The last 4 question I asked was about drug reimbursement and use 5 of published pricing such as AWP and WAC, and that's 6 right within the language of topic 1. 7 MR. BERLIN: Are you reading rebates 8 as part of reimbursement? 9 MR. ANDERSON: The rebate questions 10 were foundational leading up to my last question 11 which Mr. Fiske answered "yes" about reimbursement. 12 It just provides a -- a context for using that 13 information. 14 MR. BERLIN: And that question and -- 15 well, I -- let's not argue about it. We have 16 objections. I mean, I'm happy to if you want to 17 argue about it, but... 18 MR. ANDERSON: No, I -- I don't. In 19 fact, given Mr. Fiske's answer, I'm -- I'm through 20 with that line of questions. 21 Q. (BY MR. ANDERSON): Is this a document 22 which -- I'm referencing Exhibit 17, sir -- that 23 Imany creates or Abbott? 24 MR. BERLIN: Objection, form. 25 Objection, scope.</p>	<p>1 like a George Bush term like "computer deal". 2 Q. (BY MR. ANDERSON): Do you know -- 3 MR. BERLIN: I need to object to that. 4 Q. (BY MR. ANDERSON): Do you know the -- the 5 source that Abbott utilizes to load AWP and WAC 6 prices? 7 A. We use Analy\$ource data which is First 8 DataBank. 9 Q. And in your prior deposition, you testified 10 about Abbott's use of PriceProbe from First DataBank, 11 correct? 12 A. I did. 13 Q. And both PriceProbe and AnalySource contain 14 published pricing such as AWP and WAC pricing, 15 correct? 16 A. That's correct. 17 Q. Has Abbott always had -- to your knowledge 18 from 1994 to the present, had subscriptions to 19 PriceProbe or AnalySource? 20 A. I believe so, and I believe we also, for a 21 period of time, subscribed to Red Book. 22 Q. Did you subscribe to Red Book's electronic 23 data much like First DataBank's electronic PriceProbe 24 data, or was it only the physical printed Red Books? 25 A. I don't recall.</p>
Page 293	Page 295
<p>1 A. U- -- the user acceptance testing is 2 performed by Abbott personnel, and some of the 3 testing is specific to Abbott's policies and 4 procedures. Whether we start with an Imany document 5 or not, I couldn't tell you. That would be a 6 question that only somebody in Business Systems could 7 answer. They're the ones that actually coordinate 8 this process. 9 Q. (BY MR. ANDERSON): I see. The Business 10 Systems being a -- kind of IT-related department 11 within Abbott? 12 A. That's correct. 13 Q. Loo- -- in section 7.6, Mr. Fiske, I see 14 that that task reads "Activate AWP & WAC Pricing in 15 Imany Medicaid". What is the difference between 16 loading it and activating it? 17 A. I don't know. 18 Q. Probably some computer deal? 19 MR. BERLIN: Objection, form. 20 Objection -- 21 A. I don't know. 22 MR. BERLIN: -- scope. Make sure you 23 leave me time to object. 24 THE WITNESS: I'm sorry. 25 MR. BERLIN: Particularly if he uses</p>	<p>1 Q. But -- I take it from your answer that -- 2 that Abbott PPD no longer subscribes to the Red Book 3 data; is that correct? 4 A. I don't know that. 5 Q. Oh. It's possible; you're just not sure? 6 A. Correct. 7 Q. Okay. This falls within topic number 12, 8 Mr. Fiske, and it also is related to some of your 9 testimony yesterday -- not 12, pardon me, 11 -- some 10 of your testimony yesterday regarding good faith -- 11 A. Yes. 12 Q. -- the good faith actions of Abbott. 13 Would you consider Abbott's 14 publication of prices for reimbursement purposes with 15 knowledge that pharmacies are interested in those 16 prices for reimbursement purposes to be price 17 reporting done in good faith? 18 MR. BERLIN: Objection, form. 19 A. Abbott reported WAC and list price to the 20 data agencies in good faith without regard to any 21 reimbursement. 22 None of our price setting was done 23 with any reimbursement considerations, and none of 24 our price reporting was done with any reimbursement 25 considerations.</p>

8 (Pages 292 to 295)

Page 296

1 We always reported the WAC and list
2 price. It's the numbers that we thought we should
3 report, and we reported them in good faith thinking
4 that's what we should report.

5 Nobody told us any differently. There
6 were opportunities for the government to have told us
7 differently. There were opportunities for people at
8 the data agencies to have told us differently.

9 I don't think that anybody can say
10 that we did not operate in good faith.

11 Q. (BY MR. ANDERSON): What is it about the
12 price reporting by Abbott -- well, strike that. I'll
13 back up and ask another question.

14 Mr. Fiske, you've testified that
15 Abbott knew published prices such as its own WACs and
16 the AWP's that were a function of its WACs were used
17 by customers for reimbursement, correct?

18 MR. BERLIN: Objection, form.

19 A. They were two of many numbers that were
20 considered for reimbursement.

21 Q. (BY MR. ANDERSON): Right. And Abbott was
22 aware of that?

23 MR. BERLIN: Objection, form.
24 Objection, scope.

25 A. Yes.

Page 297

1 Q. (BY MR. ANDERSON): When Abbott was
2 publishing WACs which were 40, sometimes much more
3 percent higher than the prices paid by pharmacies,
4 knowing pharmacies were being reimbursed off of WAC
5 or AWP, was that done in good faith?

6 MR. BERLIN: Objection, form.
7 Objection, misstates testimony, misrepresents facts
8 in evidence.

9 A. There were pharmacies, there were
10 wholesalers that were purchasing at the reported WACs
11 and the list prices. We were not misreporting any
12 information. We were reporting -- the information we
13 reported was reported in good faith, and they were
14 real numbers that products were purchased at.

15 Q. (BY MR. ANDERSON): Okay. And -- and I
16 won't belabor your testimony yesterday about the
17 frequency of those prices being used to transact
18 business, but it's true, isn't it, that those
19 published prices were only utilized about five, maybe
20 ten percent of the time?

21 A. That doesn't change the fact that those
22 were real numbers that re- -- that customers
23 purchased at. Those were numbers available in the
24 marketplace. Those were numbers that customers
25 purchased at.

Page 298

1 Q. And is that position the foundation for
2 Abbott's good faith?

3 A. I explained our good faith effort. We
4 reported the numbers that we thought we should
5 report. The numbers we reported were always actual
6 prices that were not only available in the
7 marketplace; they were prices that customers, in
8 fact, purchased at.

9 Q. Is it --

10 A. Nobody told us that we should report
11 anything differently than we were reporting.

12 Q. Except for the lawsuits?

13 MR. BERLIN: Wait. That misrepresents
14 his testimony yesterday. He said -- you had a long
15 discussion about what lawsuits were and that he
16 didn't interpret them that way.

17 MR. ANDERSON: I -- I disagree with
18 that and object to the side-bar. His -- you know,
19 the testimony will speak for itself.

20 MR. BERLIN: It -- it -- it will, so
21 I don't know why you're asking this now for the third
22 time. Go ahead.

23 Q. (BY MR. ANDERSON): Mr. Fiske, do you
24 believe that it's appropriate for Abbott personnel to
25 discuss customers' reimbursement concerns with

Page 299

1 customers?

2 A. In the 2003/2004 time frame, it was made
3 very clear to Abbott personnel that we should not be
4 discussing reimbursement concerns with our customers.

5 Q. To the extent reimbursement concerns are
6 discussed with customers, would that indicate
7 Abbott's not reporting in good faith?

8 A. Not necessarily.

9 Q. When did Abbott purchase Synthroid -- I
10 mean, pardon me, Knoll?

11 A. Abbott acquired Knoll in 2001.

12 Q. Are you familiar with a person named Carol
13 Nauta?

14 A. I am.

15 Q. Was Carol Nauta -- or is Carol Nauta an
16 Abbott PPD sales representative?

17 A. She's a National Trade Executive today.

18 Q. Uh-huh. Did Carol have prior experience
19 with Knoll?

20 A. No.

21 Q. What about Dave Lutz? Is he an Abbott
22 National Trade Executive?

23 A. Dave Lutz is the National Trade Executive.

24 Q. Did Dave Lutz have any prior experience
25 with Knoll?

9 (Pages 296 to 299)

<p style="text-align: right;">Page 300</p> <p>1 A. I don't recall whether Dave joined Abbott 2 from Knoll or if he was a former Abbott employee. I 3 don't recall. He may have been a -- a Knoll 4 employee, but I don't recall for sure. 5 Q. After Abbott purchased Knoll, was there a 6 time when Abbott was selling Knoll's products, such 7 as Synthroid, under the Knoll label? 8 MR. BERLIN: Objection, scope. 9 A. When we acquired Knoll, we acquired product 10 that was packaged under the Knoll labeler code, and 11 yes, we were selling that product for a period of 12 time until we re- -- until we began manufacturing and 13 packaging the product in our own packaging. 14 Q. (BY MR. ANDERSON): Roughly what time frame 15 would that have been? 16 MR. BERLIN: Objection, scope. 17 A. It occurred over time as the inventories 18 were bled off. I couldn't tell you exactly -- the 19 inventories of the old labeler coded product. 20 Q. (BY MR. ANDERSON): It would have started 21 no sooner than the date of acquisition in 2001, 22 correct? 23 A. That's correct. 24 Q. And then do you have any kind of 25 approximation as to how many months or years the</p>	<p style="text-align: right;">Page 302</p> <p>1 deplete the existing inventories of products labeled 2 with "Knoll"? 3 MR. BERLIN: Ob- -- objection, scope. 4 A. It's pure speculation. I don't know 5 whether it's valuable to speculate. I'm not going 6 to. 7 Q. (BY MR. ANDERSON): Well, if you're not 8 able to answer the question, I understand. 9 A. I don't know the answer to the question. 10 (Exhibit 18 marked.) 11 Q. (BY MR. ANDERSON): Okay. Take a look at 12 what's been marked as Exhibit 18, please. 13 A. (Reviews document.) 14 Q. Do you recognize what's been marked as 15 Exhibit 18? 16 A. No. 17 (Exhibit 19 marked.) 18 Q. (BY MR. ANDERSON): Take a look at 19 what's -- I've marked as Exhibit 19, which I'll 20 represent to you is a document reflecting the 21 custodian and author of this electronic document 22 that's been printed as Exhibit 18. And if you're 23 looking at Exhibit 19, you see the custodian is 24 listed as Carol Nauta? 25 A. Yes.</p>
<p style="text-align: right;">Page 301</p> <p>1 marketing by Abbott personnel of the Knoll products 2 lasted? 3 MR. BERLIN: Objection, scope. 4 A. Well -- the marketing of the Knoll 5 products? We -- we were Ab- -- we were marketing the 6 Abbott products because they were Abbott products at 7 that point in time. We weren't marketing the Knoll 8 products. 9 Q. (BY MR. ANDERSON): Yeah, I understand, 10 I -- and I -- that wasn't a trap. The -- they are 11 products that are owned by Abbott as a function of 12 Abbott's purchase of Knoll as a company, but they're 13 products that have the "Knoll" label on them? 14 A. We -- we don't market a -- a labeler code. 15 We -- we market a brand, and the brands remain the 16 same. So, yes, we were marketing Synthroid, and we 17 were marketing other products that had been 18 previously sold by Knoll. 19 Q. The "brand" being the name of the 20 product -- the innovator product as opposed to the 21 name of the company? 22 A. Correct. 23 Q. Okay. Can you -- back to my original 24 question. Can you approximate from 2001 how many 25 months or years it took for Abbott personnel to</p>	<p style="text-align: right;">Page 303</p> <p>1 Q. And that's an Abbott employee, correct? 2 A. Yes. 3 Q. And then the author is listed as Dave Lutz, 4 and then there's a semicolon "BASF Corporation", 5 correct? 6 A. Correct. 7 Q. Was BASF the owner of Knoll Pharmaceuticals 8 prior to Abbott? 9 A. It was. 10 Q. And, now, looking back at Exhibit 18, 11 specifically focussing your attention on the section 12 on the second page titled "AWP Spread," the first 13 bullet reads, "Chains want more spread between AWP 14 and actual cost to offset MCO reimbursement 15 contracts". Did I read that correctly? 16 A. Yes. 17 Q. Is that statement consistent with Abbott's 18 awareness that pharmacies, including chain 19 pharmacies, were interested in reimbursement spreads? 20 MR. BERLIN: Objection, form. 21 A. I agree that we knew that chains were 22 interested in making more money than less money and 23 that they were reimbursed based on AWP. 24 Q. (BY MR. ANDERSON): Did Abbott provide such 25 spreads by publishing high WAC prices which, in turn,</p>

10 (Pages 300 to 303)

Page 304	Page 306
<p>1 triggered the publication of AWP prices? 2 MR. BERLIN: Objection, form. 3 Objection, argumentative. 4 A. No. 5 Q. (BY MR. ANDERSON): Did Abbott provide 6 spreads by reporting high inflated estimated AWP or 7 AWP to the pricing compendia? 8 MR. BERLIN: Objection, form. 9 A. No. 10 Q. (BY MR. ANDERSON): With respect to the 11 erythromycins that were selling for much less than 12 the AWP, will you agree that Abbott was enabling 13 chains to achieve more reimbursement spread on those 14 drugs? 15 MR. BERLIN: I'm sorry. Could I have 16 the question back? 17 (Requested testimony read back.) 18 MR. BERLIN: Objection, form. 19 A. No. 20 Q. (BY MR. ANDERSON): Why not? 21 MR. BERLIN: Objection, form. 22 A. Numerous reasons. As I've indicated, we 23 reported the WAC and the list price that we were 24 actually selling product for in the marketplace. 25 Some of those purchasers were, in fact, retailers.</p>	<p>1 reverse-engineering the formula that they had used in 2 the past. 3 Q. (BY MR. ANDERSON): But you agreed 4 yesterday, Mr. Fiske, that, to your knowledge, the 5 estimated AWP published by Abbott to First DataBank 6 were, in fact, ultimately the same AWP that were 7 published by First DataBank, correct? 8 A. They were the same numbers. I don't know 9 how they calculated their numbers. 10 Q. Well, the numbers were the same. 11 A. Doesn't mean they used my number. They 12 re- -- they -- they represented to us -- specifically 13 Kay Morgan represented to Mark Turon that they were 14 actually verifying and calculating the numbers 15 themselves and determining what the correct number 16 should be in conjunction with wholesalers. 17 Q. Well, you don't think that the fact that 18 over the years, all of the AWP that Abbott sent to 19 the data services coincided to the number with the 20 actual published AWP is a fluke, do you? 21 MR. BERLIN: Objection, misstates 22 evidence, assumes facts not in evidence. 23 A. I have to rely upon the conversation that 24 Kay had with Mark, as well as publications in Wall 25 Street Journal and other reports that First DataBank,</p>
Page 305	Page 307
<p>1 In addition, the actual reimbursement 2 for the products in question were not a- -- not 3 always even based on AWP. There are, as we 4 discussed previously, numerous formulas for 5 determining what a maximum allowable cost will be for 6 a product, and some of those have no relationship to 7 AWP whatsoever. So the answer is "no". 8 Q. (BY MR. ANDERSON): Would you agree that 9 for the time period around 2001 and prior when Abbott 10 was directly reporting AWP to the pricing services, 11 Abbott was enabling chain pharmacies and other 12 pharmacies to achieve spreads between AWP and the 13 actual prices they paid? 14 MR. BERLIN: Objection, form, 15 misstates evidence. 16 A. No. 17 Q. (BY MR. ANDERSON): Why not? 18 A. As I stated in previous testimony, we know 19 from conversations with people at First DataBank, 20 specifically Kay Morgan, that they were representing, 21 at least, that they were actually doing surveys of 22 their own to determine what a correct AWP should be 23 for the product. 24 All we were providing was an estimated 25 AWP which was calculated based on re-en- --</p>	<p>1 in fact, represented more recently that that's 2 exactly what they were doing. And then, of course, 3 it came out that they apparently were only doing such 4 evaluations with a single wholesaler, McKesson, I 5 believe. 6 MR. ANDERSON: Objection, 7 nonresponsive. 8 Q. (BY MR. ANDERSON): Looking at the "AWP 9 Spread" section of Exhibit 18, Mr. Fiske, you see 10 that last bullet reads, "Government is starting to 11 scrutinize what impact this spread has on state, 12 slash, federal reimbursement". Did I read that 13 correctly? 14 A. You did. 15 Q. Does this document appear to be a document 16 that would have been created at least in the 2000 or 17 later time frame? 18 MR. BERLIN: Objection, form. 19 A. It's pure speculation, but I would imagine 20 that it was created at the time that -- of the 21 transition from PISF to Abbott, in terms of in all 22 products. 23 Q. (BY MR. ANDERSON): Which would have been 24 around 2001, correct? 25 A. Correct.</p>

11 (Pages 304 to 307)

Page 308

1 Q. Do you -- do you believe that the
2 government first really started scrutinizing
3 reimbursement spreads in 2001?

4 A. I don't know when they started to
5 scrutinize reimbursement spreads.

6 Q. Does Abbott have any information that the
7 government had started to scrutinize AWP
8 reimbursement spreads -- or strike that. I'll make
9 it more broad.

10 Does Abbott have any information that
11 prior to 2001, the government was scrutinizing
12 reimbursement Medicaid spreads?

13 A. I apologize. I did not get -- and I wish I
14 had not only gotten copies of the reports, but I
15 didn't get the date of the reports that Martha
16 Schrader had actually reviewed in terms of the OIG
17 reports. The government may have been looking at
18 that information earlier.

19 Q. You're leaving open the possibility that
20 Martha reviewed reports that predated 2001?

21 A. It's possible. I don't know.

22 Q. Do you have plans to go back to Martha and
23 ask her for those reports?

24 A. I haven't decided yet.

25 Q. When you were preparing to testify, did you

Page 309

1 appreciate that the notice had specific requests for
2 the identity of documents such as the reports?

3 MR. BERLIN: Ob- -- ob- -- Objection,
4 form. And that misstates -- I mean, I guess the
5 notice did, but the designation did not.

6 A. Yeah. With no disrespect intended, when I
7 actually spoke with Martha, it was a telephone
8 conversation, and I actually didn't have the -- this
9 in front of me and I had forgotten about that part of
10 it.

11 (Exhibit 20 marked.)

12 Q. (BY MR. ANDERSON): Mr. Fiske, I'm marking
13 what you've already seen in your March 2007
14 deposition as Exhibit 20, a document titled "Federal
15 Health Care Program and Other Third Party Payor
16 Requirements - United States - Reimbursement
17 Information and Support".

18 A. (Reviews document.) Yes.

19 Q. You recognize this, don't you?

20 A. I do.

21 Q. And you were actually the initiator of this
22 back in late 2004, correct?

23 A. That's correct. I -- I want to just state
24 that this one is not signed, and this may not be the
25 ab- -- absolute final document.

Page 310

1 Q. Well, you know, I've -- I've sought any
2 copies of this that were more final. Do you think
3 that there was a final version that's different than
4 this?

5 A. I -- I don't know. I'm just stating that
6 there is a final procedure that has signatures on
7 it. It may be identical to this. It may not. It
8 won't be much different. But I just want to state
9 that for the record.

10 Q. And for the record, the signatures would be
11 where? Next to the "Approved" section with the
12 names?

13 A. Yes.

14 Q. And that's why the date would be filled in
15 there next to the signature?

16 A. That's correct.

17 MR. ANDERSON: Well, Eric, I -- months
18 ago, I asked Tara for all of these, and -- and I was
19 assured that I had them but I don't -- I don't know.
20 We need to track that down, because apparently I
21 don't have them.

22 Q. (BY MR. ANDERSON): Mr. Fiske, if you
23 could, I'm going to focus your attention on page 3 of
24 Exhibit 20.

25 A. Yes.

Page 311

1 Q. And you see a section there titled "Average
2 Wholesale Price Information," correct?

3 A. Yes.

4 Q. And the first subsection reads, No PPD
5 employees shall provide Average Wholesale Price
6 information to Customers and must refer all queries
7 to outside drug databases, except that helplines
8 approved by a Centralized Reimbursement Department
9 may inc- -- may communicate AWP information that is
10 included in an actual drug database listing or,
11 subject to approved PPD Procedures, and then it
12 continues on.

13 Is that the current policy for PPD
14 regarding AWP?

15 A. Yes.

16 Q. Prior to late 2004 when this policy was put
17 into place, were PPD employees providing AWP
18 information to customers?

19 A. From time to time they did, yes.

20 Q. And why was it decided that that type of
21 action was against company policy?

22 MR. BERLIN: Objection, form.
23 Objection, scope. Objection to the extent it seeks
24 information that is protected by attorney-client
25 privilege.

12 (Pages 308 to 311)

<p style="text-align: right;">Page 312</p> <p>1 So you may answer only to the extent 2 that you will not be relating any communication with 3 counsel. 4 A. I won't be able to answer that question. 5 It is privileged communication. 6 Q. (BY MR. ANDERSON): Are you aware of any 7 information published by the government, such as the 8 OIG guidelines that came out in 2003, which caused 9 PPD to implement a policy such as this AWP price 10 information policy? 11 MR. BERLIN: Objection, form. 12 Objection, scope. The "objection, form" includes 13 facts not in evidence. 14 Also, do you have a copy of 15 what you're referring to? That might help him 16 determine -- 17 MR. ANDERSON: No. 18 MR. BERLIN: Okay. 19 A. I don't know the -- 20 MR. BERLIN: Well, actually, I -- I 21 need you to pause, because I'm a little concerned 22 with the question as it's phrased because you have a 23 linkage in there that could potentially force him, if 24 he were to answer it fully, to disclose 25 attorney-client information.</p>	<p style="text-align: right;">Page 314</p> <p>1 end it all. All of the corporate policies and 2 division procedures were developed in conjunction 3 with the legal department, and they were all 4 privileged communication. 5 Q. (BY MR. ANDERSON): The -- I note on the 6 first page of this policy that you're note as the 7 initiator. Was it your idea to propose that this 8 type of policy be created? 9 A. No. 10 Q. Okay. Whose idea was it? 11 A. It was done -- done in conjunction with the 12 legal department and the Office of Ethics and 13 Compliance. 14 Q. Okay. Were you involved in any 15 communications with the Office of Ethics and 16 Compliance that didn't involve attorneys? 17 A. None to my recollection. 18 Q. Who -- what nonlawyer in the Office of 19 Ethics and Compliance was involved in the creation of 20 this policy? 21 MR. BERLIN: He just said not to his 22 recollection. 23 MR. ANDERSON: No, he s- -- he said 24 lawyers were always involved. I'm asking what 25 nonlawyer -- what -- not law- --</p>
<p style="text-align: right;">Page 313</p> <p>1 I mean, you have assumed in there that 2 the OIG policy led to this (indicating), and in order 3 for him to answer, he almost needs to confirm or deny 4 that, which could disclose -- 5 MR. ANDERSON: Well, I -- I appreciate 6 that, Eric. I'm not -- I'm not assuming that. I'm 7 asking him that, if there was a linkage. 8 I'll rephrase the question to avoid a 9 request for attorney-client privileged information. 10 How is that? 11 MR. BERLIN: That -- let- -- let- -- 12 let's -- that's a good start. Let's see where we go. 13 MR. ANDERSON: Okay. 14 MR. BERLIN: Thank you. 15 Q. (BY MR. ANDERSON): Sir, without disclosing 16 information you learned from attorneys, is -- did 17 Abbott institute this AWP price information policy in 18 late 2004 in relation to any government information, 19 such as the OIG guidelines that were published in 20 2003? 21 MR. BERLIN: So you can only answer -- 22 it's a "yes" or "no" question. You can only answer 23 based on information aside from legal 24 communications. 25 A. I think I can state this, and maybe it will</p>	<p style="text-align: right;">Page 315</p> <p>1 MR. BERLIN: Well, go ahead. 2 MR. ANDERSON: Yeah. 3 MR. BERLIN: I mean, I -- go ahead and 4 answer. If -- if -- it -- it assumes there was one. 5 Was there a nonlawyer that was 6 involved that -- that you -- with whom you had 7 communications outside of communications with 8 lawyers? 9 A. I don't think -- well, Debbie DeYoung and I 10 were on a committee that worked with the lawyers on 11 the policies and procedures. 12 Q. (BY MR. ANDERSON): And to your knowledge, 13 you and Ms. DeYoung were the only two non-lawyers? 14 A. I believe Jenny Tobiason may have been part 15 of that committee. I don't recall the others. 16 Q. Reading down in the next section that's 17 titled "Margin Information and Reimbursement 18 Modeling," the first subsection reads, "PPD employees 19 --" 20 A. I'm sorry. Okay. 21 Q. Yeah, I'm -- I'm in Exhibit 20. 22 A. I -- I -- I got it. 23 Q. Okay. 24 A. I'm sorry. 25 Q. And I'm in paragraph "c," little "i". It</p>

13 (Pages 312 to 315)

<p style="text-align: right;">Page 316</p> <p>1 reads, quote, "PPD employees may not use or provide 2 Customers with tools to enable reimbursement modeling 3 which may be used to determine the margin between 4 acquisition cost and reimbursement amounts, open 5 parens, quote, ('spread'), close parens. Examples of 6 such tools include reimbursement calculators, charts 7 and spreadsheets." Did I read that correctly? 8 A. Yes. 9 Q. Prior to late 2004, were PPD employees 10 providing that type of information to customers? 11 A. They may have. I don't know. 12 Q. Outside of anything that you learned from 13 discussions with counsel, are you aware of why Abbott 14 chose to prohibit that type of information? 15 A. Those are all attorney-client privileged 16 communications. 17 Q. In what context has Abbott provided AWP 18 information to customers in the past? 19 MR. BERLIN: Objection, form, assumes 20 facts not in evidence. Objection to scope. 21 A. "In the past" meaning what? Before today? 22 Q. (BY MR. ANDERSON): Before 2004, for 23 instance, late 2004 when this policy was 24 implemented. 25 MR. BERLIN: Same objection.</p>	<p style="text-align: right;">Page 318</p> <p>1 publication of stocking sheets? 2 MR. BERLIN: Same objection. 3 A. Yes. 4 Q. (BY MR. ANDERSON): Is it true that the 5 publication of AWP information was shared by Abbott 6 with customers such as wholesalers through the use of 7 forms known as NWDA forms, or other standard 8 wholesaler forms? 9 MR. BERLIN: Same objections. 10 A. I don't know what an "NWDA" form is. 11 Q. (BY MR. ANDERSON): Okay. Is it true 12 that -- that AWP information was shared by Abbott 13 with pharmacies through standard letters such as 14 "retail buying group member" letters? 15 MR. BERLIN: Same objections. 16 A. I don't know. 17 Q. (BY MR. ANDERSON): Would it be true that 18 since the institution of this policy in late 2004, 19 the prior examples of Abbott sharing AWP information 20 with pharmacies and wholesalers would be prohibited? 21 MR. BERLIN: Objection, scope. 22 A. People are not supposed to do so, that's 23 correct. 24 Q. (BY MR. ANDERSON): Are you aware of any 25 instances where Abbott personnel have violated the</p>
<p style="text-align: right;">Page 317</p> <p>1 A. I -- I certainly won't be aware of all of 2 them. You know, our managed care customers are still 3 covered by a -- an exception under the procedure and 4 policy. 5 Our -- our -- our managed care 6 customer is reimbursed based on AWP. For them to 7 understand what the value of a rebate is that we're 8 offering them, we will often share with them some AWP 9 information. 10 I believe that prior to the 11 implementation of the policy, if a customer asked for 12 information, it may have been provided by sales reps 13 and others because there was no pro- -- prohibition 14 of -- against us off- -- providing the information. 15 Q. (BY MR. ANDERSON): Prior to the 16 implementation of the AWP price information policy in 17 late 2004, is it true that Abbott personnel shared 18 AWP with pharmacy customers in the context of bids? 19 MR. BERLIN: Objection, form, 20 foundation, and objection as to scope. So you can 21 answer your personal knowledge. 22 A. I actually think that's a true statement. 23 Q. (BY MR. ANDERSON): Okay. Is it true that 24 that AWP information was shared with customers such 25 as pharmacies and wholesalers through the routine</p>	<p style="text-align: right;">Page 319</p> <p>1 policy on AWP price information instituted in late 2 2004? 3 MR. BERLIN: Objection, scope. 4 A. I think that's a privileged communication 5 actually. The only way I know is from some 6 privileged communications, I believe. I -- I may 7 have other knowledge, but I'm not recalling any 8 other. 9 Q. (BY MR. ANDERSON): The -- you -- you may 10 have -- you're -- you're saying you do have 11 knowledge, but it was gained from an attorney? 12 A. I believe that's the only knowledge I have, 13 but I may have others that I don't recall. 14 Q. When did you gain that awareness? 15 A. In the course of preparing for this 16 deposition. 17 Q. So in the past few weeks? 18 A. Yes. 19 Q. What department or division was potentially 20 violating the policy? 21 MR. BERLIN: Objection, and -- 22 objection to attorney-client privilege, and I'm going 23 to instruct you not to answer that question. 24 MR. ANDERSON: Well, wait a second. 25 I'm -- I'm entitled to the underlying facts. I'm</p>

14 (Pages 316 to 319)

<p style="text-align: right;">Page 320</p> <p>1 just not entitled to the legal analysis. 2 Can I -- can I get at least the 3 division? I don't know. I -- it seems like -- 4 MR. BERLIN: Let me -- let me talk to 5 him about the -- I -- I think I need to learn more 6 about the communication. 7 MR. ANDERSON: Okay. 8 MR. BERLIN: And -- 9 MR. ANDERSON: Let's take a break. 10 MR. BERLIN: -- I actually have a -- 11 have a feeling like there may be some bit of a 12 miscommunication going on. So let me see if I can 13 determine the privilege. 14 MR. ANDERSON: Okay. 15 MR. BERLIN: And -- and -- and maybe 16 it's an appropriate time for us to -- I mean, how 17 much time is left on the video? 18 THE VIDEOGRAPHER: It's time to get 19 off. 20 MR. BERLIN: It's time anyway? 21 THE VIDEOGRAPHER: We have five 22 minutes. 23 MR. BERLIN: So that -- that -- that 24 would be an appropriate time to break anyway. 25 MR. ANDERSON: Okay.</p>	<p style="text-align: right;">Page 322</p> <p>1 only learned of those through attorneys? 2 A. Not that I'm aware of. 3 Q. Did you learn of some communication of AWP 4 information by Abbott personnel subsequent to late 5 2004 in the course of preparing to testify as their 6 corporate representative? 7 MR. BERLIN: Well, I'm going to let 8 him answer that because I've -- I'm -- I -- in an 9 effort to try to clear up the confusion -- 10 MR. ANDERSON: Uh-huh. 11 MR. BERLIN: -- without waiving any 12 attorney client privilege, if you'll agree to that. 13 MR. ANDERSON: Sure. 14 MR. BERLIN: I mean, that doesn't -- 15 MR. ANDERSON: Yeah. 16 MR. BERLIN: -- mean all of a sudden 17 you can get into all the conversations that we had in 18 prep, but I think it's worth it to try to alleviate 19 this confusion and move on. 20 A. I don't think I'm aware of any potential 21 violations that -- is that what your last question 22 was? I -- I'm not -- 23 Q. (BY MR. ANDERSON): Yes. 24 A. -- aware of anything that was communicated 25 to me in preparation for this case --</p>
<p style="text-align: right;">Page 321</p> <p>1 MR. BERLIN: Is that all right? 2 MR. ANDERSON: Yeah. 3 MR. BERLIN: Okay. 4 THE VIDEOGRAPHER: We are off the 5 record at 10:20 a.m. This is the end of tape 6. 6 (Recess taken.) 7 THE VIDEOGRAPHER: We are back on the 8 record at 10:34 a.m. 9 MR. BERLIN: And I probably should 10 clarify that on the record, that -- that we have been 11 able to determine that there was some confusion as to 12 the questions and answering, and that there -- there 13 is a privilege that applies to some of this 14 communication that, quite frankly, led to the 15 confusion. 16 MR. ANDERSON: Okay. 17 MR. BERLIN: So we can go from there. 18 Q. (BY MR. ANDERSON): I'll start where we 19 were, Mr. Fiske. Other than information you've 20 learned from attorneys, are you aware of any 21 instances where Abbott personnel have violated the 22 policy instituted in late 2004 regarding the 23 communication of AWP price information? 24 A. Not that I can think of. 25 Q. Okay. Are there some instances but you've</p>	<p style="text-align: right;">Page 323</p> <p>1 Q. Okay. 2 A. -- related to potential violations of -- 3 Q. Right. 4 A. -- of AWP. 5 Q. Right. How long has Abbott sold Neoral? 6 A. We haven't sold Neoral ever. 7 Q. Who -- who -- do you know which drug 8 company manufactures and sells Neoral? 9 A. I believe it's Novartis. 10 Q. Is -- is Neoral a competitive product to an 11 Abbott product? 12 A. It is. 13 Q. Which product? 14 A. Gengraf. 15 (Exhibit 21 marked.) 16 Q. (BY MR. ANDERSON): Take a look, if you 17 could, at what's been marked as Exhibit 21. 18 A. (Reviews document.) 19 MR. BERLIN: And can you just give 20 some tie-in to the notice, just because we're on a 21 drug that is a non-Abbott drug that doesn't compete 22 one of -- with one of the drugs? So -- 23 MR. ANDERSON: It's -- it has to do 24 with the reimbursement modeling and what have you, 25 and I would contend it has to do with the -- much of</p>

15 (Pages 320 to 323)

Page 324

1 the notice, but specifically the good faith.
 2 MR. BERLIN: Although the good faith
 3 relates just to -- it relates to this case which
 4 relates to Ery. So I'm going to object to the scope,
 5 and you can answer within -- and I'm sure you didn't
 6 have discussions with this under the notice, but you
 7 can answer this with respect to your -- your personal
 8 knowledge of -- of what he has to ask, if you have
 9 any.
 10 A. (Reviews document.)
 11 Q. (BY MR. ANDERSON): Have you seen this
 12 document before?
 13 A. I may have. I don't recall.
 14 Q. Have you seen documents similar to this
 15 with profit analysis?
 16 MR. BERLIN: Objection, form.
 17 A. Yes.
 18 Q. (BY MR. ANDERSON): Is this a type of
 19 document that Abbott personnel have created?
 20 A. I don't know whether they created this
 21 one.
 22 Q. I know -- I realize that. I'm saying, have
 23 you seen documents similar to this that have been
 24 created by Abbott personnel?
 25 A. Yes.

Page 325

1 MR. BERLIN: Well, can -- can --
 2 objection to form as to what you mean by "similar,"
 3 and objection to scope.
 4 A. Yes.
 5 Q. (BY MR. ANDERSON): Mr. Fiske, in what
 6 context have you seen documents similar to this that
 7 provide profit analysis?
 8 A. I don't recall when these documents may
 9 have been prepared, however, and that's one of the
 10 things I'm struggling with, because I don't know
 11 where you're going with it. But at the time that we
 12 launched Gengraf, Gengraf was a generic AB-rated to
 13 Neoral.
 14 I know that there was some modeling
 15 done regarding what the value of Gengraf was relative
 16 to Neoral.
 17 Q. When was Gengraf launched as a generic by
 18 Abbott?
 19 A. I don't recall.
 20 Q. And when you say there was some modeling
 21 done, you're talking about modeling conducted by
 22 Abbott personnel, correct?
 23 A. Yes.
 24 Q. Who specifically?
 25 A. People in my department.

Page 326

1 Q. And when the modeling was created
 2 intern- -- what -- who was it shared with?
 3 A. People in the managed care -- managed care
 4 marketing group.
 5 Q. So personnel at Abbott who would be calling
 6 on managed care customers?
 7 A. As well as people who might be calling on
 8 retail accounts, I believe.
 9 Q. Such as the national trade executives?
 10 A. I don't believe that it was shared with
 11 them, but it may have been.
 12 Q. Was it shared with people in Trade
 13 Relations such as Tip Parker to your knowledge?
 14 A. I believe so.
 15 Q. Why?
 16 MR. BERLIN: Objection, form.
 17 A. We were seek- --
 18 MR. BERLIN: Objection, scope.
 19 A. We were attempting to contract with
 20 retailers as well as other organizations, hospitals
 21 through purchasing organizations, etcetera, to have
 22 them stock our product as a generic.
 23 Q. (BY MR. ANDERSON): And this information
 24 concerning profit analysis could be shared by Abbott
 25 personnel to customers to influence them in stocking

Page 327

1 Gengraf?
 2 MR. BERLIN: Objection, form.
 3 Objection, scope.
 4 A. I don't know whether it was or not.
 5 Q. (BY MR. ANDERSON): Was that why it was
 6 created?
 7 A. It was created for us to evaluate the
 8 situation.
 9 Q. "The situation" being the relative
 10 profitability of Gengraf versus its generic
 11 competitor Neoral?
 12 A. Correct.
 13 Q. And what was ultimately determined?
 14 A. That not only was Gengraf going to cost
 15 payors less money, but it was likely that pharmacies
 16 would make more money on the product.
 17 Q. And ultimately was Gengraf marketed by
 18 Abbott?
 19 A. It was.
 20 MR. BERLIN: I'm sorry. I --
 21 objection to scope, and objection to scope goes to
 22 the entire line of testimony.
 23 Q. (BY MR. ANDERSON): When -- when was
 24 Gengraf launched roughly?
 25 MR. BERLIN: Objection to scope.

16 (Pages 324 to 327)

<p style="text-align: right;">Page 328</p> <p>1 A. I -- I told you I don't recall.</p> <p>2 Q. (BY MR. ANDERSON): Okay. That's what --</p> <p>3 the date that you were having trouble recalling?</p> <p>4 A. That's correct.</p> <p>5 Q. Was it within the past five years?</p> <p>6 MR. BERLIN: Objection, scope.</p> <p>7 A. I don't recall. I don't think so, but I</p> <p>8 don't recall.</p> <p>9 Q. (BY MR. ANDERSON): So it would have</p> <p>10 been -- well, let's -- I -- I -- I appreciate you</p> <p>11 don't recall and I -- I know that you may not recall</p> <p>12 the precise date, but if you can at least give me a</p> <p>13 time frame within a decade, early or late '90s, for</p> <p>14 instance, was that when Gengraf was launched?</p> <p>15 MR. BERLIN: Objection, form.</p> <p>16 Objection, scope.</p> <p>17 A. I know that it seems like I should know,</p> <p>18 but I -- I -- I don't recall whether it was late '90s</p> <p>19 or early thousands.</p> <p>20 Q. (BY MR. ANDERSON): Okay. Was this type of</p> <p>21 profit analysis created for purposes of conveying</p> <p>22 this information to pharmacies?</p> <p>23 MR. BERLIN: Objection, form.</p> <p>24 Objection, scope.</p> <p>25 A. I don't recall whether it was used for that</p>	<p style="text-align: right;">Page 330</p> <p>1 MR. BERLIN: Well, these are questions</p> <p>2 that don't relate in any way to Ery, and we've had</p> <p>3 this experience before where counsel has come in and</p> <p>4 asked questions that relate not to -- at all to the</p> <p>5 case that is actually being prosecuted but</p> <p>6 essentially conducting -- and I'm not accusing you of</p> <p>7 doing this, I'm telling you what my concern is --</p> <p>8 MR. ANDERSON: Uh-huh.</p> <p>9 MR. BERLIN: -- that -- that -- of</p> <p>10 counsel coming in and conducting essentially a civil</p> <p>11 investigation where we should be put on notice of</p> <p>12 that but without putting us on notice of it.</p> <p>13 And -- and I just -- that -- you've</p> <p>14 had this long quest- -- this long sets of questions</p> <p>15 about Gengraf, and there is absolutely no link at all</p> <p>16 to erythromycin. Now -- I mean, is -- is there a</p> <p>17 link to erythromycin in this?</p> <p>18 MR. ANDERSON: Well, absolutely.</p> <p>19 That's why I'm asking all the questions, because it's</p> <p>20 my contention that this bears upon the knowledge of</p> <p>21 all the personnel. When they're marketing one</p> <p>22 product, it's not as if they don't know those same</p> <p>23 things when they're marketing another product.</p> <p>24 MR. BERLIN: But it -- it -- he</p> <p>25 didn't say that it was any knowledge that it was used</p>
<p style="text-align: right;">Page 329</p> <p>1 purpose or not.</p> <p>2 Q. (BY MR. ANDERSON): I -- I appreciate</p> <p>3 you're not able to recall whether it was used for</p> <p>4 that purpose. I'm asking, was it created for that</p> <p>5 purpose?</p> <p>6 MR. BERLIN: Same objections.</p> <p>7 A. It was originally created to evaluate</p> <p>8 things in-house. I don't know whether it was used</p> <p>9 for other purposes or not. I just don't recall.</p> <p>10 Q. (BY MR. ANDERSON): What is Tip Parker's --</p> <p>11 strike that.</p> <p>12 What was Tip Parker's role in the</p> <p>13 marketing of Gengraf upon its launch?</p> <p>14 MR. BERLIN: Objection, form.</p> <p>15 Objection, scope.</p> <p>16 A. Well, I don't recall the time that it</p> <p>17 launched --</p> <p>18 MR. BERLIN: Actually, I'm going to</p> <p>19 ask you to hold on a second. You --- can you answer</p> <p>20 whether you know of any investigation or complaint</p> <p>21 under seal relating to Gengraf in Abbott's sale and</p> <p>22 use of Gengraf?</p> <p>23 MR. ANDERSON: No, I -- I don't think</p> <p>24 I can answer that, but that's not what this is all</p> <p>25 about.</p>	<p style="text-align: right;">Page 331</p> <p>1 by Marketing, and that's kind of where you left it</p> <p>2 and where it left me concerned.</p> <p>3 I mean, he's saying to his knowledge,</p> <p>4 it was used internally and that it may have been used</p> <p>5 with Managed Care, which, of course, there's an</p> <p>6 exception to the policy for Managed Care.</p> <p>7 MR. ANDERSON: I -- I'll -- the</p> <p>8 testimony will speak for itself. I don't think</p> <p>9 that's accurate. And, you know, I can't really see</p> <p>10 how the dialogue you and I are having is productive,</p> <p>11 but I -- I feel like this is within the scope of</p> <p>12 discovery of this pending case, and I'm not trying to</p> <p>13 somehow do some underhanded civil investigation, if</p> <p>14 that's what you're worried about.</p> <p>15 MR. BERLIN: Well, I'm con- -- in --</p> <p>16 in part concerned about that, and then I'm even more</p> <p>17 concerned about it that you tell me that you can't</p> <p>18 tell me whether there is an --</p> <p>19 MR. ANDERSON: Well, if -- if it's</p> <p>20 under seal, I can't disclose. But that's -- I mean,</p> <p>21 that -- that -- that's -- even if I were to address</p> <p>22 the question, you know, I can't --</p> <p>23 MR. BERLIN: Yeah, but the fact is --</p> <p>24 MR. ANDERSON: -- I -- I don't --</p> <p>25 MR. BERLIN: I understand you --</p>

17 (Pages 328 to 331)

Page 332

1 MR. ANDERSON: -- I can't -- you
 2 can't put me --
 3 MR. BERLIN: -- might not be able
 4 to --
 5 MR. ANDERSON: -- in that spot.
 6 MR. BERLIN: I know -- understand you
 7 might not be able to disclose that to me --
 8 MR. ANDERSON: Yeah.
 9 MR. BERLIN: -- but if you knew that
 10 there was not one and -- and -- and you knew that for
 11 a fact, you could disclose to me that there is not
 12 one. So it raises -- it raises at least the -- and
 13 I'm not -- again, I'm not accusing you of this --
 14 MR. ANDERSON: Yeah.
 15 MR. BERLIN: -- and I don't -- and you
 16 know I don't like to have these discussions on the
 17 record, and generally we have not, but it is a very
 18 sensitive issue in fact -- if in fact this is
 19 occurring either intentionally or unintentionally
 20 that it's essentially discovery that something is
 21 under seal and that -- you know, that this -- this is
 22 going on without us having notice --
 23 MR. ANDERSON: I -- I'm --
 24 MR. BERLIN: -- of that.
 25 MR. ANDERSON: -- telling you crystal

Page 333

1 clear that that's definitely not happening.
 2 MR. BERLIN: Not intentionally, you're
 3 not --
 4 MR. ANDERSON: Right.
 5 MR. BERLIN: But there may be under
 6 seal and there -- essentially someone is getting
 7 discovery about -- about Gengraf --
 8 MR. ANDERSON: Well, it's not me.
 9 MR. BERLIN: -- about -- about Gengraf
 10 where -- where -- and I just don't see the link to --
 11 I mean, ask the questions about Ery if you want, did
 12 -- did -- "did this occur with Ery," "did this occur
 13 with Ery," "did you do this with Ery".
 14 But sitting and going in-depth as
 15 to -- at -- what -- what went on with Gengraf, I
 16 don't see is -- is -- it's definitely not within the
 17 notice, and if it were a -- just an individual
 18 deposition, maybe there would be more slack, but it's
 19 not even -- I mean, it's not even close to within the
 20 notice.
 21 Everything here has been --
 22 MR. ANDERSON: Well, you --
 23 MR. BERLIN: -- pared down to Ery.
 24 MR. ANDERSON: Well, you -- you can
 25 object to the -- the scope of the notice and -- and

Page 334

1 he can answer the questions, and whether or not he's
 2 speaking on behalf of the corporation can be resolved
 3 later.
 4 I told you that I think it goes to
 5 the knowledge, and I think, therefore, it bears upon
 6 the -- the good faith as y'all have pled it. And
 7 granted, that's a very broad topic, but, I mean,
 8 y'all pled it. I didn't plead it.
 9 MR. BERLIN: Yeah, but --
 10 MR. ANDERSON: So --
 11 MR. BERLIN: -- what -- what that
 12 was -- and, again, I'm not going to belabor this much
 13 longer -- why Abbott's actions relevant to this case
 14 were taken in good faith. I mean, that's what he's
 15 designated to test about --
 16 MR. ANDERSON: Uh-huh.
 17 MR. BERLIN: -- testify about. So --
 18 how much more questioning do you have on Gengraf?
 19 MR. ANDERSON: Well, actually, when
 20 you interjected, I was primarily asking questions
 21 about Tip Parker and her role, so it's getting to be
 22 more of -- you know, it's wrap -- I'm wrapping it
 23 up. But I need to --
 24 MR. BERLIN: Okay.
 25 MR. ANDERSON: I need to understand

Page 335

1 some more about --
 2 MR. BERLIN: Okay.
 3 MR. ANDERSON: -- what her role was.
 4 MR. BERLIN: Well, I'm going to have a
 5 continuing objection to scope on -- on all -- on all
 6 of this, but go ahead.
 7 MR. ANDERSON: Okay.
 8 MR. BERLIN: Even Tip Parker's role is
 9 not -- I mean, you could have had a -- a -- a topic
 10 that is what were the role of each of these
 11 individuals, so I don't even think that is within the
 12 s- -- in -- that alone is within the scope. But go
 13 ahead.
 14 Q. (BY MR. ANDERSON): What -- back to the
 15 question, Mr. Fiske, after all that. What was Tip
 16 Parker's role, as you understood it, in the launch of
 17 Gengraf?
 18 MR. BERLIN: Objection, scope.
 19 A. If I recall correctly, Tip Parker was
 20 Director of Trade Relations at the time that we
 21 launched Gengraf, in a different capacity, a
 22 different kind of role than she has today, and
 23 responsible for the national trade executives. They
 24 may not have had that title back then, but they still
 25 were responsible for negotiating contracts with

18 (Pages 332 to 335)

Page 336	Page 338
<p>1 retail pharmacies to chains primarily for the 2 inclusion -- for them to carry Gengraf. 3 Q. (BY MR. ANDERSON): And so she was 4 receiving information such as that in Exhibit 21 to 5 assist her and the people reporting to her in the 6 marketing of Gengraf, correct? 7 A. She would have been in meetings with myself 8 and other people in the Managed Care Organization to 9 talk about our product relative to the competitive 10 products. 11 MR. BERLIN: And I -- I missed an 12 objection to scope, and it goes to all of these 13 questions. 14 Q. (BY MR. ANDERSON): And -- and the reason 15 she would have been in those meetings and the reason 16 she would have been provided information such as that 17 in Exhibit 21 is to assist in the marketing of the 18 drug, correct? 19 A. To assist us in determining what a correct 20 price point might need to be for us to be successful 21 with the product on our contract pricing. 22 Q. And also on your published pricing, 23 correct? 24 MR. BERLIN: Objection, scope. 25 A. And also our published pricing.</p>	<p>1 that the AWP's that are listed for Neoral on the first 2 page are different than the AWP's that are listed for 3 the other drugs on the other pages? 4 A. Yes. 5 Q. Does that indicate to you that those are 6 the Gengraf AWP's? 7 MR. BERLIN: Same objections. 8 A. They may be. I don't know. 9 Q. (BY MR. ANDERSON): Isn't it likely that -- 10 A. If they're in the relative range, they -- 11 they may be. 12 Q. Okay. And so is it true that with respect 13 to the setting of the market prices on Gengraf, 14 Abbott was also considering the reimbursement spreads 15 on Gengraf? 16 MR. BERLIN: Objection, form. 17 Objection, scope. 18 A. As I said, the WACs had already been 19 established for the product by that point in time. I 20 don't know that -- I don't know that that's a -- a 21 correct characterization of things. 22 We certainly looked at it from the 23 customers's point of view, but you have to remember 24 that this would be contract customers' point of 25 view. And if you actually look at what we garnered</p>
Page 337	Page 339
<p>1 Q. (BY MR. ANDERSON): So is it true that with 2 respect to the setting of the published prices, 3 Abbott did consider the relative reimbursement spread 4 of its product versus a competitive product? 5 MR. BERLIN: Objection, scope. 6 A. I don't think so, because I think our WAC 7 had been determined and we were going to determine 8 what our discount price was. I don't -- I don't -- 9 our -- our reimbursement didn't enter into our 10 determination of what our WAC price was. 11 Q. (BY MR. ANDERSON): You -- I notice in 12 Exhibit 21 there are several different pages showing 13 the AWP of Neoral, correct? 14 A. Yes. 15 Q. And in order to conduct an analysis of 16 Gengraf compared to Neoral -- well, strike that. 17 The first page is for Neoral, correct? 18 A. That's what it states. 19 Q. And then are the next pages the AWP and 20 other pricing information for Gengraf? 21 A. (Reviews document.) 22 MR. BERLIN: Same objections. 23 A. I don't know. 24 Q. (BY MR. ANDERSON): Well, you'll -- you'll 25 see -- and you'll agree with me, won't -- won't you,</p>	<p>1 in terms of business, there were many, many customers 2 for this product that purchased at WAC. 3 So I -- I don't know where you're 4 headed with it, but the reimbursement is going to 5 depend upon what people paid for the product -- or 6 the -- I'm sorry, the reimbursement spread is going 7 to depend on what people paid for the product, and 8 this is just a look at one particular customer. Not 9 a customer specifically. I'm talking about -- 10 Q. (BY MR. ANDERSON): In -- 11 A. -- a potential contract customer. 12 Q. In looking at page 2 of Exhibit 21, which 13 price is the WAC price -- 14 MR. BERLIN: Object- -- 15 Q. (BY MR. ANDERSON): -- if any? 16 MR. BERLIN: I'm sorry. Objection, 17 form. Objection, scope. 18 A. (Reviews document.) I don't see a WAC 19 price listed. 20 Q. (BY MR. ANDERSON): What is the base price 21 representing? 22 MR. BERLIN: Objection, form. 23 Objection, scope. 24 A. I don't know. 25 Q. (BY MR. ANDERSON): Did Abbott offer Base</p>

19 (Pages 336 to 339)

<p style="text-align: right;">Page 340</p> <p>1 Deal prices or base prices on Gengraf?</p> <p>2 MR. BERLIN: Objection, form.</p> <p>3 Objection, scope.</p> <p>4 A. There was no Base Deal pricing for Gengraf.</p> <p>5 Q. (BY MR. ANDERSON): For Gengraf, did Abbott</p> <p>6 understand that the AWP was a function of the</p> <p>7 published WAC?</p> <p>8 MR. BERLIN: Ob- -- objection, form.</p> <p>9 Objection, scope.</p> <p>10 A. The estimated AWP was based on the WAC for</p> <p>11 this analysis, I'm sure.</p> <p>12 Q. (BY MR. ANDERSON): What was the formula</p> <p>13 that Abbott utilized to estimate these AWP's that are</p> <p>14 shown on the second page of Exhibit 21?</p> <p>15 MR. BERLIN: Objection, form.</p> <p>16 Objection, scope.</p> <p>17 A. Without the WAC price being on there, I</p> <p>18 wouldn't know.</p> <p>19 Q. (BY MR. ANDERSON): Is it --</p> <p>20 A. But I would speculate that it was 125</p> <p>21 percent of WAC.</p> <p>22 Q. Bear with me for just a moment. I'm going</p> <p>23 to do a little math. Well, I've done the math, and</p> <p>24 the -- the base price is less than \$41.25 divided by</p> <p>25 1.25.</p>	<p style="text-align: right;">Page 342</p> <p>1 Q. (BY MR. ANDERSON): In that --</p> <p>2 A. -- which would provide profitability for</p> <p>3 all parties.</p> <p>4 Q. And by "payor," you mean the reimbursing?</p> <p>5 A. Correct.</p> <p>6 Q. And so -- and by "provider," you mean</p> <p>7 pharmacies, as well as, potentially, hospitals and</p> <p>8 what have you, correct?</p> <p>9 A. That would be correct.</p> <p>10 Q. And so how did pharmacies' profitability</p> <p>11 factor into the pricing?</p> <p>12 MR. BERLIN: Objection, scope.</p> <p>13 A. Ultimately it didn't, to the extent that we</p> <p>14 were second to market and we had to be competitive</p> <p>15 with the way the other generic was pricing their</p> <p>16 product.</p> <p>17 Q. (BY MR. ANDERSON): Is it true that the --</p> <p>18 that ultimately the Gengraf generic was more</p> <p>19 profitable to the pharmacy than the Neoral generic?</p> <p>20 A. The competitive generic --</p> <p>21 MR. BERLIN: I -- I'm sorry.</p> <p>22 Objection, scope.</p> <p>23 A. The competitive generic was probably the</p> <p>24 most profitable to the pharmacy. I told you we were</p> <p>25 second to market. We never priced our product --</p>
<p style="text-align: right;">Page 341</p> <p>1 A. I know. I did the same math.</p> <p>2 Q. So --</p> <p>3 MR. BERLIN: Let -- let the record</p> <p>4 reflect that Mr. Fiske did his in his head, and</p> <p>5 Mr. Anderson and I needed to use a calculator.</p> <p>6 MR. ANDERSON: Well, Mr. Fiske is an</p> <p>7 accountant, I'm not, so that -- he's good with</p> <p>8 numbers.</p> <p>9 MR. BERLIN: We were -- we were just</p> <p>10 having a little bit of fun.</p> <p>11 Q. (BY MR. ANDERSON): Did -- did Abbott</p> <p>12 conduct analysis similar to that shown in Exhibit 21</p> <p>13 with respect to the erythromycins?</p> <p>14 A. Not to my knowledge, not ever.</p> <p>15 Q. Why would Abbott conduct this type of</p> <p>16 analysis with respect to Gengraf and its generic</p> <p>17 competitors but not erythromycins and their generic</p> <p>18 competitors?</p> <p>19 MR. BERLIN: Objection, form.</p> <p>20 A. It was a newly-launched product. We</p> <p>21 were -- we were hoping, but we weren't the first --</p> <p>22 we were hoping to be the first generic in the market,</p> <p>23 and we were trying to figure out how do we need to</p> <p>24 price the product, not only to create value for the</p> <p>25 payor but also for the provider --</p>	<p style="text-align: right;">Page 343</p> <p>1 generally did not price our product as low as the</p> <p>2 competitive product.</p> <p>3 Q. (BY MR. ANDERSON): Which competitive</p> <p>4 product are you referring to?</p> <p>5 A. I -- I believe Sidmak was first to market.</p> <p>6 I can't recall.</p> <p>7 Q. Oh, you're profit- -- okay. I know what</p> <p>8 you're saying. Gengraf was determined to be more</p> <p>9 profitable for the pharmacy by Abbott as compared to</p> <p>10 Neoral, but it was not more profitable as compared to</p> <p>11 a generic made by Sidmak?</p> <p>12 A. I believe that was the company, yes.</p> <p>13 Q. Okay.</p> <p>14 MR. BERLIN: And, again, continuing</p> <p>15 objection to scope.</p> <p>16 Q. (BY MR. ANDERSON): And did that ultimately</p> <p>17 re- -- did that situation ultimately result in Sidmak</p> <p>18 garnering more of the sales than Abbott?</p> <p>19 MR. BERLIN: Scope.</p> <p>20 A. Actually, no.</p> <p>21 Q. (BY MR. ANDERSON): Did Abbott -- I think</p> <p>22 you testified a few moments ago that Abbott</p> <p>23 ultimately wasn't too successful in selling Gengraf</p> <p>24 to pharmacies; is that true?</p> <p>25 A. Not with respect to pharmacies.</p>

20 (Pages 340 to 343)

Page 344

1 Q. Right. So with respect to pharmacies, did
2 ultimately Sidmak's generic do better in the
3 marketplace and sell more than Gengraf?

4 MR. BERLIN: Scope, and objection to
5 form as well.

6 A. I -- I -- I know this gets cer- -- I'm
7 going to say no, and you can ask me more questions.

8 Q. (BY MR. ANDERSON): Why?

9 MR. BERLIN: Objection to scope.

10 A. Our product had been -- unlike most generic
11 products, we actually did clinical studies on our
12 product. If you knew the brand name product well,
13 you would find out that it caused tremendous body
14 odor. Our product didn't.

15 Our product was tested in patients --
16 these are transplant rejection drugs.

17 Q. (BY MR. ANDERSON): Uh-huh.

18 A. And our product had -- as I said, clinical
19 studies had been done on the product.

20 So we were actually able to
21 demonstrate superiority versus brand because it
22 didn't cause this tremendous body odor issue, and it,
23 in fact, was demonstrated that it did prevent
24 rejection -- organ rejection.

25 Competitive generics entering the

Page 345

1 marketplace had no such studies to fall back on. We
2 promoted our product actually to physicians and in
3 hospitals, transplant centers, and it was widely
4 accepted by those physicians and they were more
5 willing to accept the generic substitution of our
6 product, but it was also written for patients that
7 were new transplant patients.

8 So despite the fact that a significant
9 number of pharmacies, including CVS, declined our
10 contract offer, they ended up buying an awful lot of
11 our product at WAC because ours was the most
12 prescribed generic.

13 Q. So that was a function of -- of the
14 Gengraf, although it was AB-rated, actually being
15 marketed and detailed by Abbott successfully as a
16 brand to the physicians?

17 MR. BERLIN: Objection, scope.

18 A. Yeah, it's a pretty unusual strategy in the
19 marketplace, but it's a unique market as well.

20 Q. (BY MR. ANDERSON): And, in turn, when the
21 pharmacies were dispensing Gengraf often, they did
22 not have an option to dispense the generic Sidmak
23 version bec- -- or the Neoral because it -- the
24 physicians were writing for Gengraf brand name only,
25 correct?

Page 346

1 MR. BERLIN: Objection, form.
2 Objection, scope.

3 A. Or when they called, the physician would
4 decline to allow the substitution, yeah.

5 Q. (BY MR. ANDERSON): Yes. Okay. But with
6 respect to the -- the pharmacies' profitability,
7 Abbott ascertained that the Sidmak generic was more
8 profitable than the Gengraf, correct?

9 MR. BERLIN: Objection, scope.

10 A. Well, since a MAC is established when
11 there's three or more products in the marketplace, at
12 that point in time, I think -- and since pharmacies
13 were representing to us that our price was higher, I
14 guess if you do the math, it must have been more
15 profitable for them to sell Sidmak than Gengraf.

16 Q. (BY MR. ANDERSON): Given that -- well,
17 strike that.

18 I believe you just testified that this
19 Gengraf situation was relatively unique, and it was a
20 unique marketing strategy for an AB-rated drug,
21 correct?

22 A. To my knowledge.

23 Q. Would you agree that the marketing strategy
24 Abbott implemented for the erythromycins was more of
25 a standard generic marketing plan?

Page 347

1 MR. BERLIN: Objection, form.

2 A. You know what? I'm not a marketing person,
3 and I don't know what a "standard generic marketing
4 plan" is for a product.

5 Q. (BY MR. ANDERSON): Well, what were you
6 basing your statement that Gengraf was relatively
7 unique upon?

8 A. I -- I haven't heard of manufacturers doing
9 clinical studies and promoting AB-rated generics
10 generally to physicians.

11 Q. Right. Typically a generic drug is not
12 marketed on its clinical features because those
13 features are the same as all the other generics that
14 it competes with, correct?

15 A. That's what people represent.

16 Q. And so, in turn, one of the ways that
17 generic drugs such as the erythromycins are marketed
18 is based on contract price, correct?

19 A. Correct.

20 Q. And then also, generic drug companies
21 appreciate, and Abbott appreciated, that pharmacies
22 are interested in reimbursement issues, correct?

23 A. We understood that pharmacies were
24 interested in reimbursement issues, yes.

25 Q. And so, for instance, with a generic, then

21 (Pages 344 to 347)

<p style="text-align: right;">Page 348</p> <p>1 one of the attributes of that product can be and is</p> <p>2 the relative reimbursement that it provides to the</p> <p>3 pharmacy when it's dispensed versus a competitive</p> <p>4 generic --</p> <p>5 MR. BERLIN: Objection, form.</p> <p>6 Q. (BY MR. ANDERSON): -- correct?</p> <p>7 MR. BERLIN: Objection, form.</p> <p>8 A. If there's any difference at all.</p> <p>9 Q. (BY MR. ANDERSON): And sometimes there is</p> <p>10 because there's variation in the published prices or</p> <p>11 there's variation in the contract prices between the</p> <p>12 competing generics, correct?</p> <p>13 A. Well, contract pricing is something</p> <p>14 different than reimbursement. Reimbursement based on</p> <p>15 a MAC, there wouldn't be any difference.</p> <p>16 Q. Right. Well, we'll get to the MAC in a</p> <p>17 second. And I agree with you that contract pricing</p> <p>18 is different than the prices that are published --</p> <p>19 A. Oh.</p> <p>20 Q. -- and then used by reimburse- --</p> <p>21 reimbursement entities, so I'll -- I'll ask you an</p> <p>22 additional question to frame this.</p> <p>23 The reimbursement is based on prices</p> <p>24 that are used for reimbursement, such as the</p> <p>25 published WAC or the published AWP and, on the other</p>	<p style="text-align: right;">Page 350</p> <p>1 AWP or WACs?</p> <p>2 A. Or more --</p> <p>3 MR. BERLIN: Objection -- hold on.</p> <p>4 Objection, form. Objection, scope.</p> <p>5 Q. (BY MR. ANDERSON): Is that --</p> <p>6 A. Or, more appropriately, based on a survey</p> <p>7 of retail pharmacies to find out what their actual</p> <p>8 acquisition cost was, as -- which was the case with</p> <p>9 some states.</p> <p>10 Q. What -- why do you say that's more</p> <p>11 appropriate?</p> <p>12 A. Because that's probably the best indication</p> <p>13 of what an actual acquisition cost is --</p> <p>14 Q. And how --</p> <p>15 A. -- is to actually survey the pharmacies</p> <p>16 themselves.</p> <p>17 Q. How often --</p> <p>18 A. They know what they paid for the products,</p> <p>19 sir.</p> <p>20 Q. How often do you think Medicaid programs</p> <p>21 should survey pharmacies?</p> <p>22 MR. BERLIN: Objection, form.</p> <p>23 Objection, scope.</p> <p>24 A. As often as somebody at that level deems</p> <p>25 appropriate.</p>
<p style="text-align: right;">Page 349</p> <p>1 hand, the contract price is actually paid by the</p> <p>2 pharmacies, correct?</p> <p>3 A. Would you say that again, please?</p> <p>4 Q. The reimbursement profits, or the</p> <p>5 reimbursement spread, is calculated on the one hand,</p> <p>6 you have the published prices that are used for</p> <p>7 reimbursement like AWP or WAC, and on the other hand,</p> <p>8 you have the actual prices paid by the pharmacies,</p> <p>9 correct?</p> <p>10 MR. BERLIN: Objection, form.</p> <p>11 A. That's a misrepresentation of what actually</p> <p>12 occurs. That may be the case with some products, but</p> <p>13 as we've discussed many times in this deposition,</p> <p>14 there are numerous reimbursement formulas that are</p> <p>15 used by the states to determine what their MACs are,</p> <p>16 and it may not bear any relationship to a published</p> <p>17 WAC or AWP for a multisource product.</p> <p>18 Q. (BY MR. ANDERSON): Right. Because</p> <p>19 sometimes a MAC, a maximum allowable cost, is part of</p> <p>20 the formula, correct?</p> <p>21 A. It usually is for a multisource drug.</p> <p>22 Q. Yes. But likewise, Abbott appreciated that</p> <p>23 also usually part of the formula for reimbursement</p> <p>24 would be estimated acquisition costs set by the</p> <p>25 Medicaid programs based on published prices such as</p>	<p style="text-align: right;">Page 351</p> <p>1 Q. (BY MR. ANDERSON): Do you know how</p> <p>2 expensive surveys are?</p> <p>3 A. I don't know.</p> <p>4 Q. Does Abbott have any information about the</p> <p>5 relative costs and benefits of conducting surveys of</p> <p>6 pharmacies?</p> <p>7 A. With -- with all due respect, sir, it would</p> <p>8 be no more expensive for them to require the retail</p> <p>9 pharmacist to report that information than it is for</p> <p>10 manufacturers to report AMPs.</p> <p>11 Q. It -- it wouldn't?</p> <p>12 A. I don't know why it would be.</p> <p>13 Q. Ex- -- explain what you mean.</p> <p>14 A. By federal law, we're required to report an</p> <p>15 average manufacture price on a quarterly basis. They</p> <p>16 could require all of the major chains and other</p> <p>17 pharmacies to report estimated acquisition costs on a</p> <p>18 quarterly basis. It would give them the right number</p> <p>19 every time, wouldn't it?</p> <p>20 Q. So really what you're saying is that --</p> <p>21 that there should have been different laws in place?</p> <p>22 MR. BERLIN: Objection, form.</p> <p>23 A. I'm just saying, sir, that some states</p> <p>24 actually did surveys of retail pharmacies. I don't</p> <p>25 know the frequency of those surveys, but some states</p>

22 (Pages 348 to 351)

Page 352

1 did so. And that is a reasonable approach to
2 determining what the actual acquisition cost is for a
3 retail pharmacy. Ask them.

4 Q. (BY MR. ANDERSON): Okay. But you don't --
5 as Abbott's corporate representative, you don't have
6 any information on the relative costs of the surveys,
7 the relative accuracy of the surveys, or any type of
8 information to support that statement, do you?

9 MR. BERLIN: Objection, form.

10 A. No, sir.

11 Q. (BY MR. ANDERSON): And you don't have a
12 position, as Abbott's corporate representative, on
13 how accurate a survey would be after it was
14 conducted, given that prices change in the
15 marketplace, correct?

16 A. No, sir.

17 Q. Okay. So going back to my original
18 question which is the evaluation of reimbursement
19 spreads, do you agree that on the one hand you have
20 the drug cost reimbursement calculation which
21 includes published prices such as AWP's and WAC's, but
22 also may include a MAC, and on the other hand, you
23 have the providers' actual costs, such as the price
24 the pharmacy pays, correct?

25 A. That's part of the determination of the

Page 353

1 pharmacy profit. There's also a dispensing fee
2 involved.

3 Q. Right. And with respect to this
4 calculation of ingredient cost or reimbursement
5 spread, did Abbott consider that in marketing its
6 drugs, such as the information shown in Fiske Exhibit
7 21?

8 A. I don't know whether it was considered in
9 terms of the marketing of the drugs. Not to the best
10 of my knowledge, but I -- I may not be correct.

11 Q. What would you consider this function in
12 which it was utilized in the context of Exhibit 21?

13 A. Well --

14 MR. BERLIN: Objection, scope.

15 A. I -- I -- I'm trying to draw a distinction
16 between whether we used something for internal
17 evaluation purposes to determine cost -- an
18 appropriate contract price to establish for a product
19 versus "marketing" implies that you're perhaps
20 communicating all of that to the respective
21 customer.

22 Q. (BY MR. ANDERSON): Oh, I see. Okay. And
23 I appreciate your -- your testimony earlier that
24 you're -- it could have been communicated out to the
25 customers; you're not sure if it was or wasn't,

Page 354

1 correct?

2 A. Correct.

3 Q. Okay. I'll limit this question, then, to
4 just internal evaluations, what you do know occurred.

5 Will you agree, sir, that in setting
6 prices, Abbott considered relative reimbursement
7 spreads based on ingredient cost reimbursement in
8 setting prices?

9 A. For setting contract pricing on Gengraf, we
10 did.

11 Q. Okay. Was that type of consideration
12 conducted on other drugs?

13 A. Not to my recollection.

14 Q. Why was Gengraf special?

15 A. It -- it -- as a --

16 MR. BERLIN: Objection, form.
17 Objection, scope.

18 A. As it's a brand name pharmaceutical
19 manufacturer, it was very unusual for us to ever --
20 the Pharmaceutical Products Division is a brand name
21 pharmaceutical manufacturer and seller.

22 The products that are generic are
23 products that were brands that have gone generic, an
24 exception to that is Gengraf, where somebody
25 identified this unique opportunity to actually do

Page 355

1 these clinical studies and perhaps make something
2 more of a generic drug than others.

3 We subsequently found out that we
4 actually aren't a generic company and don't -- don't
5 do a very good job of being a generic company. But
6 it was a unique drug, and it was an isolated, unusual
7 situation in terms of the evaluation that we were
8 doing.

9 Q. (BY MR. ANDERSON): Given that Abbott
10 marketed the erythromycins as generics as well, do
11 the same considerations that were reflected in
12 Exhibit 21 for Gengraf apply to erythromycins?

13 A. They could have applied, but I don't recall
14 them ever having been discussed in any of our
15 considerations for pricing of the product.

16 Q. Do you have any information that for the
17 erythromycins, the type of analysis reflected in
18 Exhibit 21 for Gengraf was not done?

19 A. I think I can state this for a fact, that
20 it has never been done during the 15 to 16 years I've
21 been in the Pricing and Contracting Department.

22 I was a financial analyst supporting
23 National Accounts in probably 1990 or '91 time frame,
24 and I don't recall an analysis like that having been
25 done at that point in time either.

23 (Pages 352 to 355)

Page 356

1 Q. Why do you think that analysis was
2 considered important for purposes of Gengraf's
3 generic launch, but it wasn't considered important
4 for the erythromycin generic launch back in the late
5 '80s?

6 A. There never was a generic launch of the
7 Erys. The Erys were branded products that
8 subsequently faced generic competition. And now
9 you're going back further than I have any
10 recollection or knowledge of events, so -- other than
11 to state that -- that fact.

12 Q. Well, I mean, maybe they weren't launched
13 in the sense that they were launched as a new NDC
14 number, but they were launched as generics that were
15 AB-rated and eligible for generic substitution,
16 correct?

17 A. I don't know.

18 Q. You don't know? Okay.

19 There was at least a decision to
20 market the erythromycins as generics as opposed to
21 brands, correct?

22 A. Well -- well, yes and no. I mean, we saw
23 the document that -- or talked about the document
24 that I discussed with Charlie Aubuchon regarding the
25 classification of the products as a generic back in

Page 357

1 the '88 to '91 time frame, but they were always
2 marketed as a brand at the same time.

3 Q. Right. They were -- they -- they had an
4 NDC number that was a brand NDC number, as it had
5 been for many, many years back into the '70s, and
6 then they also had a new NDC number that was marketed
7 as a generic, and that's what led to, for instance,
8 the advertisements known as "the Ery gang"
9 advertisements that notified the industry that drugs
10 were eligible for generic substitution, correct?

11 A. No.

12 Q. "No"?

13 A. No.

14 Q. What led to Abbott advertising that the
15 products were eligible for generic substitution?

16 A. I don't know the events that transpired
17 back then, but there were not different NDC numbers.

18 Q. How can the same NDC number be marketed as
19 a brand and marketed as a generic?

20 MR. BERLIN: Objection, form.

21 A. The same way Gengraf was. It was branded a
22 generic. You pro- -- I'm saying that they were
23 promoted based on their existing brand names. They
24 were priced competitively with generics in the
25 marketplace. So that's how you market them both as a

Page 358

1 brand and a generic.

2 Q. (BY MR. ANDERSON): If a physician in the
3 late '90s wrote a prescription for erythromycin and
4 wrote "brand only," which company's product would
5 have been dispensed?

6 A. Well, I can't imagine that situation ever
7 actually occurring.

8 Q. So it's just -- it's an -- it's an
9 impossible hypothetical?

10 A. I can't imagine writing "brand name only"
11 for -- "brand only" for an Ery product.

12 Q. Okay. So the truth is that, it's your
13 testimony, the Abbott erythromycins from the late
14 '80s on were marketed purely as generics?

15 A. I want to caveat that to the extent that we
16 still had our brand name equity that we took
17 advantage of.

18 Q. Right. The -- such as the tag line, "the
19 erythromycin company," etcetera?

20 A. Yes.

21 Q. Okay.

22 A. And Ery-Tab is a well- -- well-respected
23 brand. It's the most dispensed Ery even today.

24 Q. Right. Okay. With respect to the
25 marketing of the erythromycins as generics, do you

Page 359

1 have any information that the same considerations
2 about reimbursement and spreads or profits that are
3 shown in Exhibit 21 that applied to Gengraf were not
4 considered with respect to erythromycins?

5 A. I have no knowledge that they ever were.

6 Q. Do you have any knowledge that they
7 specifically were not?

8 MR. BERLIN: Objection, form.

9 Q. (BY MR. ANDERSON): Was there -- what I'm
10 getting at, was there some policy in place that it's
11 okay to market with these types of considerations
12 about pharmacy profit for Gengraf, but it's not okay
13 to market with considerations about pharmacy profit
14 for erythromycins?

15 MR. BERLIN: Objection, form, and
16 misstates the testimony in evidence.

17 A. No.

18 Q. (BY MR. ANDERSON): Okay.

19 MR. BERLIN: Is -- do you mind if we
20 take a very brief break, a personal break?

21 MR. ANDERSON: Sure.

22 MR. BERLIN: Thanks.

23 THE VIDEOGRAPHER: We are off the
24 record at 11:20 a.m.

25 (Recess taken.)

24 (Pages 356 to 359)

Page 360	Page 362
<p>1 THE VIDEOGRAPHER: We are back on the 2 record at 11- -- 11:31 a.m. 3 Q. (BY MR. ANDERSON): Okay. I think just one 4 last exhibit. 5 (Exhibit 22 marked.) 6 Q. (BY MR. ANDERSON): If you could -- golly. 7 I keep doing that. Mr. Fiske, take a moment and 8 review what's been marked as Exhibit 22. 9 MR. ANDERSON: And, Eric, I'm sorry, I 10 don't have an extra copy of this one. It's actually 11 been marked before in the Kadish deposition also as 12 Exhibit 1, but you're welcome to -- 13 MR. BERLIN: May I just take a look at 14 it -- 15 MR. ANDERSON: Sure. 16 MR. BERLIN: -- before? 17 MR. ANDERSON: Sure. And I'll tell 18 you what pages I'm going to look at, and you can look 19 at those too. The specific pages are 305184, I'm 20 going to ask some questions about that page. 21 MR. BERLIN: Just that page or -- 22 MR. ANDERSON: Well, there's a very 23 similar page, -95. 24 MR. BERLIN: I'll give it to you in a 25 moment --</p>	<p>1 probably defined in our agreement where they're 2 providing us competitive information for calculating 3 market shares to determine if, in fact, they qualify 4 for certain incentives. 5 This information, I believe, is 6 actually on a report created by a company named Data 7 Niche Associates, who we contracted with at that time 8 to scrub the information provided by the PBMs looking 9 for duplicate prescriptions, unusual sized scripts, 10 etcetera, and we would not pay on such scripts that 11 were not qualified under the terms of our agreement. 12 Q. All right. So a PBM -- this document 13 pertains to Abbott's business dealings with a 14 pharmacy benefits manager known as Caremark, correct? 15 A. It appears to. 16 Q. And Caremark would be actually reimbursing 17 pharmacies when prescriptions for their member 18 patients were dispensed? 19 A. Correct. 20 Q. Okay. And if Caremark reimbursed for 21 certain amounts of units, then they may be entitled 22 to some additional rebate from Abbott, correct? 23 A. It depends upon the terms of our rebate 24 agreement exactly how it was defined for this period 25 of time in terms of what their rebates would be and</p>
Page 361	Page 363
<p>1 THE WITNESS: Sure. That's fine. 2 MR. BERLIN: The -- basically they're 3 the charts and then there are the documents at the 4 back? 5 MR. ANDERSON: Right. 6 MR. BERLIN: Okay. 8495, two pages, 7 but -- 8 MR. ANDERSON: 84 and 95, yeah. 9 MR. BERLIN: Yeah, but I -- I -- you 10 know, look through the whole thing. 11 A. (Reviews document.) Okay. 12 Q. (BY MR. ANDERSON): Do you recognize 13 Exhibit 22? 14 A. I don't think I've ever seen it before. 15 Q. Do you know what it is? 16 A. Yes, I do. 17 Q. What is it? 18 A. It's a rebate calculation -- well, I -- I 19 want to be careful. (Reviews document.) It's -- 20 if -- if -- if, in fact, this entire document goes 21 together, so some of -- this is somewhat speculative, 22 but it appears to be a rebate claim for a company by 23 the name of Caremark, a large PBM. 24 It appears to be information regarding 25 our products as well as competitive products that are</p>	<p>1 how they would be calculated. 2 Q. I understand the specifics may vary, but as 3 a general proposition, the -- the concept was that 4 Caremark would -- would reimburse for Abbott products 5 and potentially prefer Abbott products on its 6 formulary for reimbursement over others, and then 7 in -- if it satisfied certain levels of 8 reimbursement, then may be entitled to a rebate from 9 Abbott? 10 A. More likely, if they weren't disadvantaged 11 relative to other brand name competitive products 12 that were defined in the contract, they might be 13 eligible for a rebate, than to say that they were 14 actually preferring our products. 15 Q. Oh, I see. Abbott wasn't so much looking 16 for preference for its brands, but just at least not 17 a disincentive to use Abbott's over a competing 18 brand? 19 A. Correct. 20 Q. Okay. 21 A. But there may have been market share 22 incentives to actually promote the brand. 23 Q. I see. All right. My questions -- my 24 specific questions are focused on page 184. 25 A. Yes.</p>

25 (Pages 360 to 363)

Page 364

1 Q. And there's some fields at the top of this
 2 spreadsheet titled, for instance, Rx Market Share
 3 Percentage?
 4 A. Yes.
 5 Q. That's prescription market share?
 6 A. Correct.
 7 Q. What does that mean?
 8 A. I told you that some of these contracts had
 9 performance incentives based upon market share.
 10 Market share was almost always for our
 11 performance-based contracts based on prescription
 12 market share of our products relative to the other
 13 products in that defined market. The contract would
 14 define what the market was.
 15 Q. So the number -- the prescriptions, though,
 16 specifically reference the number of prescriptions
 17 written for Biaxin in comparison to other brands that
 18 are within its therapeutic class?
 19 A. As defined in the contract, right.
 20 Q. Okay. And then you've got a unit market
 21 share percentage, which I'm assuming is the same, but
 22 it's just -- rather than on the paper script, it's
 23 based on the number of actual Biaxin products
 24 dispensed, correct?
 25 A. I'm assuming that's the way it's

Page 365

1 calculated.
 2 Q. Okay.
 3 A. It's not a number we would have used.
 4 Q. What number would y'all have used?
 5 A. Prescription market share.
 6 Q. Okay. And, then, likewise, there's a
 7 column titled Total AWP and then AWP Market Share.
 8 Do you understand what AWP Market Share references
 9 there?
 10 A. I can only assume that it's done the same
 11 way that a prescription market share is. It's
 12 totally irrelevant to us. We never paid based on AWP
 13 market share. I -- I don't even know how meaningful
 14 it is. It's -- you know, you've got all different
 15 prices of products out there at different price --
 16 at -- so you've got many different pri- -- products
 17 out there at different prices. I don't know what it
 18 means to have an AWP market share that --
 19 Q. Well, that --
 20 A. -- you're comparing it to.
 21 Q. Yeah. That was going to be my question,
 22 is: How is AWP pricing or AWP market share
 23 calculated or --
 24 MR. BERLIN: Ob- -- objection --
 25 Q. (BY MR. ANDERSON): -- if you know?

Page 366

1 MR. BERLIN: Objection, form, and --
 2 and scope. I mean, it's not --
 3 A. Right. So it -- it would be speculation on
 4 my part. I don't understand this at all, but this is
 5 a DNA document, and they may use that for some of
 6 their scrubbing efforts. But it -- it -- the only
 7 information we would have used off this document is
 8 prescription market share. They have standard
 9 reports that they issue is my speculation.
 10 Q. (BY MR. ANDERSON): Does -- does the AWP in
 11 this context have any meaning different than the AWP
 12 that's utilized as published, for instance, by the
 13 compendia?
 14 MR. BERLIN: Objection, form.
 15 Objection, scope.
 16 A. I don't know what it means. I don't know
 17 whether it was the AWP reported by the plans
 18 themselves or if it's some num- -- some number that
 19 Data Niche calculated. I don't know where it came
 20 from.
 21 Q. (BY MR. ANDERSON): Are you aware of any
 22 pricing known as average wholesale price or known by
 23 the acronym of "AWP" other than the pricing that's
 24 published through the compendia?
 25 A. I'm not aware of it.

Page 367

1 Q. So you're not aware of -- of any kind of
 2 AWP that Caremark creates, are you?
 3 A. I'm not aware of it.
 4 Q. Okay. Are you aware of Data Niche creating
 5 any AWPs?
 6 MR. BERLIN: Objection, scope.
 7 A. No.
 8 Q. (BY MR. ANDERSON): All right. Now look,
 9 Mr. Fiske, if you could, at the page that ends with
 10 the numbers "195".
 11 A. Yes.
 12 Q. And that's got some grand totals for the
 13 different fields that we just talked about, including
 14 a grand total of over \$10 million for total AWP. Do
 15 you see that?
 16 A. Yes.
 17 Q. Does that indicate to you that they're
 18 utilizing AWP as some way to quantify in dollars the
 19 value of the drugs that they're reimbursing?
 20 MR. BERLIN: Objection, form.
 21 Objection, scope.
 22 A. All right. So -- I -- I -- I've done too
 23 much speculation already. I don't know whether this
 24 is a document that came from DNA or if it's a
 25 document that came from Caremark. I don't know

26 (Pages 364 to 367)

Page 368

1 what -- why there's any AWP information on here and
2 what the relevance of the market share would mean.
3 It has no relevance to me whatsoever.

4 Q. (BY MR. ANDERSON): Do you -- just big
5 picture, Mr. Fiske, do you have an awareness that
6 sometimes AWP is utilized as a gauge of the value of
7 a drug?

8 A. No.

9 Q. For instance, I've reviewed some packages
10 of information provided to the field sales force that
11 details Abbott's brand drugs, and I've seen
12 references to the AWP prices of Abbott's product and
13 the AWP prices of competing brand products. Are you
14 familiar with those types of documents?

15 MR. BERLIN: Objection, form.
16 Objection, scope.

17 A. Provided to the sales force?

18 Q. (BY MR. ANDERSON): Yes, sir. That's --
19 it -- they typically are thick packages, and at the
20 bottom it says "For Sales Representatives" in big
21 bold letters?

22 MR. BERLIN: Same objections.

23 A. I -- I don't know for sure whether I'm
24 aware of them or not. I'm -- I don't recall.

25 Q. (BY MR. ANDERSON): Let me see if I can

Page 369

1 find one for you. Well, I don't -- I don't have one
2 on me. I'll -- I'll ask a different question.

3 Do you -- do you know of instances
4 where Abbott has utilized AWP as an indicator of the
5 value of a drug?

6 A. I -- I think I will say yes.

7 Q. Okay. What context?

8 A. I told you that one of the things that we
9 do when we evaluate price actions is to evaluate the
10 cost of our product relative to other brand name
11 competitive products.

12 The best way to do that is not on a
13 tablet of Biaxin versus a tablet of Syn- -- of -- of
14 Zithromax, but, rather, what does an average Biaxin
15 prescription cost, or what does a -- an average day
16 use of Biaxin cost relative to the average
17 prescription or day use of the competitive product --
18 cost per day is what I meant to say.

19 We do that blended price analysis
20 using both WAC and AWP.

21 Q. Yes, sir. And that's -- those -- you've
22 just described the documents that I was familiar with
23 from Abbott's production. Why does Abbott utilize
24 AWP's in those blended pricing models?

25 A. Because it's one of the metrics that's

Page 370

1 reported by First DataBank, and we do it to see if
2 there's changes that occur over time.

3 I think I told you that back -- maybe
4 I didn't pres- -- describe the specific time frame,
5 but I told you that data agencies' formulas changed
6 over time.

7 And one of the reasons that we often
8 track pricing both on a WAC and an AWP basis is to
9 see if the data agencies are changing their formula,
10 because the best reflection of the price increases by
11 the manufacturer are on a WAC basis, not on an AWP
12 basis. If, in fact, the data agencies are changing
13 their formula, you might see a bigger or lower price
14 increase than the manufacturer actually implemented.

15 Q. We'll get to the WAC in a moment. With
16 respect to the AWP, does Abbott utilize the AWP as a
17 gauge of the cost of a drug product, for instance, on
18 a per-day basis because AWP's can reflect the cost of
19 the product?

20 MR. BERLIN: Objection, form.

21 A. I don't know that AWP's ever reflect the
22 cost of the product. I -- you know, some people in
23 the industry refer to AWP as "ain't what's paid," so
24 I don't think it's ever reflects what people are
25 paying for the product.

Page 371

1 Q. (BY MR. ANDERSON): Why does Abbott choose
2 to utilize some of the AWP's in its blended pricing
3 models?

4 A. We just do.

5 Q. Is it true, sir, that for most brand drugs,
6 the AWP's are a reliable indicator of the actual
7 prices paid?

8 MR. BERLIN: Ob- -- objection, form.
9 Objection, scope.

10 A. I think it provides you a relative price
11 comparison. I think that's the only thing that I
12 could agree with.

13 Q. (BY MR. ANDERSON): And -- and --

14 A. It doesn't provide an absolute price
15 comparison at all.

16 Q. Right. It's not absolute, but if you mark
17 it down roughly somewhere between 16-and-two-thirds
18 percent and 20 percent, you can approximate what a
19 brand drug is really selling for to pharmacies,
20 correct?

21 A. I don't know what they're selling them to
22 pharmacies for.

23 Q. What does a markdown off of a brand drug
24 AWP of 16-and-two-thirds percent or 20 percent
25 represent?

27 (Pages 368 to 371)

Page 372	Page 374
<p>1 A. Well, a 20-percent off of a -- an AWP 2 that's 125 percent of WAC would take you back to the 3 WAC price. 4 Q. Okay. 5 A. That may be a -- I don't -- I can't do the 6 other one in my head as quickly as I did the last 7 time, but -- 8 Q. Well, it's 20- -- 9 A. -- that may be true for -- 10 Q. -- I'll tell you -- 11 A. -- the other one as well. 12 Q. I'll tell you, a 16-and-two-thirds-percent 13 markdown is the reciprocal of a 20-percent markup. 14 A. I'll take your word for it. 15 Q. Okay. So -- so you're familiar with the 16 fact that AWP's for brand drugs can be reliable 17 indicators of actual market prices, correct? 18 A. No, I wouldn't say that necessarily. It 19 depends upon whether there is contracting efforts 20 going on. But it is -- it may be -- I -- you -- I 21 think you have to look at the WAC price and 22 determine -- and use -- and perhaps rely on the WAC 23 price as a real price in the marketplace and the list 24 price as a real price in the marketplace. 25 Q. Okay. I'll get to WAC in just a moment.</p>	<p>1 MR. BERLIN: Objection, form. 2 A. Yes. 3 Q. (BY MR. ANDERSON): All right. Is that one 4 of the reasons why Abbott utilizes WAC prices in its 5 blended pricing models in comparison -- comparing the 6 cost of its brand versus the cost of competing 7 brands? 8 A. Yes. 9 Q. And how can that cost information be 10 utilized by Abbott sales personnel in detailing a 11 brand drug to a physician? 12 A. I can't -- 13 MR. BERLIN: Objection -- I'm sorry. 14 Objection, form. Objection, scope. 15 A. I want to be careful, because I do think 16 there may be some materials that are ultimately 17 approved that can show the cost of our drug relative 18 to the other products. So I don't know all those 19 rules, I apologize. 20 So as long as you are very clear in 21 disclosing what the comparison is, I don't -- I think 22 that's all that's important. If -- if you're 23 comparing WACs to WACs, people can draw their own 24 conclusions if they believe that those are the same 25 numbers reported by everybody.</p>
Page 373	Page 375
<p>1 Let's do this, then. With respect to AWP, will you 2 agree that it's been known for many years that AWP's 3 for most brand drugs are either 20 or 25 percent 4 higher than the WACs? 5 A. I think it's been known for years that the 6 AWP's reported by the data agencies are approximately 7 20 to 25 percent higher than the WACs published by 8 manufacturers. 9 Q. Okay. Now with respect to the WACs, will 10 you agree that the WAC prices for most brand drugs 11 are reliable indicators of actual prices paid for the 12 drugs? 13 MR. BERLIN: Objection, form. 14 A. They are for Abbott. 15 Q. (BY MR. ANDERSON): And those prices that 16 are paid -- strike that. 17 The WAC prices that are paid for most 18 Abbott drugs, within the PPD Division at least, are 19 paid at WAC by pharmacies, correct? 20 A. May I ask you to repeat that question? 21 Q. Sure. And that was my fault. I didn't 22 phrase it well. 23 Is it true that for most brand drugs 24 sold and marketed by PPD, that the WAC prices reflect 25 what pharmacies actually pay to acquire the drug?</p>	<p>1 Q. (BY MR. ANDERSON): Okay. Why does Abbott 2 provide that type of WAC-to-WAC analysis? That's 3 where -- that's where I'm really getting at. 4 MR. BERLIN: Objection, form. 5 Objection, scope. 6 A. I think just to show the relative cost of 7 one drug versus another. 8 Q. (BY MR. ANDERSON): Does -- does Abbott 9 have reason to believe that physicians take relative 10 cost into consideration when they're writing 11 prescriptions? 12 A. I think that Abbott believes in general 13 physicians don't know the relative cost of one drug 14 versus another. 15 Q. But if they're educated about the cost of 16 one drug versus another, that could potentially 17 influence them in -- in writing a prescription for 18 one brand as opposed to the other? 19 A. It may. 20 Q. Is that one of the reasons why that type of 21 WAC comparison is provided in the information to 22 physicians? 23 A. I -- I -- I don't know for sure whether it 24 is being provided to physicians, so I -- I want to be 25 careful. I don't -- I'm not a salesperson, and I</p>

28 (Pages 372 to 375)

Page 376	Page 378
<p>1 don't see the sales materials. It may be, but --</p> <p>2 Q. Okay.</p> <p>3 A. -- so I don't know whether it is being</p> <p>4 provided to physicians.</p> <p>5 Q. I understand. At least from your</p> <p>6 perspective in the pricing department, you understood</p> <p>7 that's one of the reasons why the materials were</p> <p>8 created, but whether that information concerning</p> <p>9 WAC-to-WAC comparisons is actually shared with the</p> <p>10 physicians, you're not sure?</p> <p>11 A. It may --</p> <p>12 MR. BERLIN: Objection, scope.</p> <p>13 THE WITNESS: Sorry.</p> <p>14 A. It may be specifically for rep education.</p> <p>15 I don't know.</p> <p>16 Q. (BY MR. ANDERSON): Abbott sales rep</p> <p>17 education?</p> <p>18 A. Yes.</p> <p>19 THE VIDEOGRAPHER: We have five</p> <p>20 minutes.</p> <p>21 MR. ANDERSON: I've got five minutes</p> <p>22 left on the tape, and I've got one quick question</p> <p>23 from yesterday.</p> <p>24 Q. (BY MR. ANDERSON): In the context of</p> <p>25 Exhibit 13 which were the handwritten notes of</p>	<p>1 there any other person with the last name "Fiske"</p> <p>2 that you have reason to believe would be referenced</p> <p>3 in his notes other than you?</p> <p>4 A. No.</p> <p>5 Q. Okay. And Teresa Fiske doesn't have</p> <p>6 anything to do with pricing or anything else with</p> <p>7 respect to the erythromycins, does she?</p> <p>8 A. I have no idea what she does.</p> <p>9 Q. You just know she works at Abbott, and</p> <p>10 that's it?</p> <p>11 A. She -- she did work at Abbott. I don't</p> <p>12 know whether she's still there or not.</p> <p>13 Q. Okay. And you knew that because maybe</p> <p>14 sometimes you got e-mails that were supposed to go to</p> <p>15 her?</p> <p>16 A. I think -- I think there's been three</p> <p>17 Fiskes at Abbott, and I'm no relation to any of the</p> <p>18 other two.</p> <p>19 Q. See, I have the common last name</p> <p>20 "Anderson," so I run across other Andersons all the</p> <p>21 time on -- get the wrong mail and what have you. I</p> <p>22 understand.</p> <p>23 MR. ANDERSON: Okay. Well, with that,</p> <p>24 I'll pass the witness.</p> <p>25 MR. BERLIN: We have -- we have no</p>
Page 377	Page 379
<p>1 Mr. Sellers --</p> <p>2 A. Yes.</p> <p>3 Q. -- I had asked you if you knew of any other</p> <p>4 persons with the last name "Fiske," and you had said</p> <p>5 you actually knew of a woman named Teresa Fiske.</p> <p>6 I -- I just need to tie that down a little more.</p> <p>7 Do you have any reason to believe,</p> <p>8 Mr. Fiske, that the "Fiske" referred to in the</p> <p>9 context of these notes about evaluating volume risk</p> <p>10 with AWP drops is anyone other than yourself?</p> <p>11 MR. BERLIN: Well, I -- objection to</p> <p>12 form, because that -- he testified that he didn't</p> <p>13 have any reason to believe that he was involved in</p> <p>14 that.</p> <p>15 A. I don't know whose notes these are. I</p> <p>16 don't have any reason to believe that it's anybody</p> <p>17 other than myself. I don't know why the notes were</p> <p>18 ever taken, because I don't recall any discussions</p> <p>19 regarding this topic with Mr. Sellers.</p> <p>20 Q. (BY MR. ANDERSON): Yeah, I understand that</p> <p>21 you don't recall the discussion, and -- and</p> <p>22 Mr. Sellers has already testified about the</p> <p>23 discussion and, you know, his testimony will be what</p> <p>24 it is.</p> <p>25 But what I'm asking you, sir, is: Is</p>	<p>1 questions, so...</p> <p>2 MR. WINGET-HERNANDEZ: As I said</p> <p>3 before, I don't have any questions at this time.</p> <p>4 MR. BERLIN: Great.</p> <p>5 THE VIDEOGRAPHER: That's it? We are</p> <p>6 off the record at 11:59 a.m. This is the end of tape</p> <p>7 7.</p> <p>8 (Deposition concluded.)</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>

29 (Pages 376 to 379)

Page 380

CHANGES AND SIGNATURE

WITNESS NAME: JOSEPH E. FISKE February 18, 2009

PAGE/LINE CHANGE REASON

Page 382

THE STATE OF TEXAS)
COUNTY OF BEXAR)

I, TAMMY POZZI, Certified Shorthand Reporter in and for State of Texas, do hereby certify that, pursuant to agreement of counsel, there came before me on February 18, 2009 at 9:08 a.m. in the law offices of Jones Day, 77 West Wacker, 35th Floor, Chicago, Illinois, the following named person, to-wit: JOSEPH E. FISKE, who was by me duly sworn to testify to the truth and nothing but the truth of his knowledge touching and concerning the matters in controversy in this cause; that he was thereupon carefully examined upon his oath and his examination reduced to typewriting under my supervision; and that the deposition is a true record of the testimony given by the witness.

I further certify that I am neither attorney nor counsel for, nor related to or employed by, any of the parties to the action in which this deposition is taken, and further that I am not a relative or employee of any attorney or counsel employed by the parties hereto nor financially interested in the action.

Page 381

I, JOSEPH E. FISKE, have read the foregoing deposition and hereby affix my signature that same is true and correct, except as noted above.

JOSEPH E. FISKE

THE STATE OF)
COUNTY OF)

Before me, , on this day personally appeared JOSEPH E. FISKE, known to me [or proved to me on the oath of or through (description of identity card or other document)] to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purposes and consideration therein expressed. (Seal) Given under my hand and seal of office this day of , 2009.

Notary Public in and for
the State of Texas

Page 383

IN WITNESS WHEREOF I have hereunto set my hand and seal on this the 3rd day of March, 2009

C.S.R. NUMBER 5629 TAMMY POZZI, Certified
Expires 12/31/10 Shorthand Reporter in
and for the State of Texas.

Firm No. 611
Expires 12/31/10

30 (Pages 380 to 383)

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